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OVERSIGHT HEARINGS ON SECTION 404 OF THE CLEAN WATER ACT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

NINETY-NINTH CONGRESS

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CONTENTS

May 21, 1985

OPENING STATEMENTS

Page

Chafee, Hon. John H., U.S. Senator from the State of Rhode Island 1

Mitchell, Hon George J., U.S. Senator from the State of Maine 2

Symms, Hon. Steve, U.S. Senator from the State of Idaho 4

WITNESSES

Arnett, G. Ray, executive vice president, National Rifle Association 14

    Letter dated November 7, 1984, addressed to Mr. Dawson 19

Baxter, Charles K., fish and wildlife biologist, U.S. Fish and Wildlife Service 29

    Written statement 48

Cooper, Josephine S., Assistant Administrator for External Affairs, Environmental Protection Agency 40

    Written statement 78

Dawson, Robert K., Acting Assistant Secretary of the Army, Civil Works 35

    Written statement 50

Gordon, William G., Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration 38

    Written statement 73

Potter, J. Craig, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior 42

    Written statement 91

Reed, Max, Chief, Regulatory Functions Branch, Lower Mississippi Valley Division, Corps of Engineers 28

Spotts, Clinton, Chief, Federal Activities Branch, Environmental Protection Agency, Region VI, Dallas, TX 26

Statements submitted for the Record:

    Wallop, Hon. Malcolm, U.S. Senator from the State of Wyoming 5

June 10, 1985 (p. 95)

OPENING STATEMENTS

Chafee, Hon. John H., U.S. Senator from the State of Rhode Island 95

Lautenberg, Hon. Frank R., U.S. Senator from the State of New Jersey 103

Mitchell, Hon. George J., U.S. Senator from the State of Maine 105

Stafford, Hon. Robert T., U.S. Senator from the State of Vermont 101

Symms, Hon. Steve, U.S. Senator from the State of Idaho 106

WITNESSES

Page

Cooper, Josephine S., Assistant Administrator for External Affairs, EPA; Dawson, Robert K., Acting Assistant Secretary of the Army, Civil Works; Gordon, William G., Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration; and Potter, J. Craig, Acting Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.

[NOTE:—The above witnesses, having been asked at a prior hearing, to return, have no introductory statements. Questioning begins on page 107.]

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

- Letters:
  - Missouri Department of Conservation 97
  - From Senators Mitchell and Baucus to Senator Barry Goldwater, chairman, Armed Services Committee 157
- Pond number 12, Rio Grande Valley, TX, pictures of 131
- Responses from the Environmental Protection Agency to additional questions from:
  - Senator Bentsen 149
  - Senator Moynihan 150

JULY 15, 1985 (p. 159)

OPENING STATEMENTS

Chafee, Hon. John H., U.S. Senator from the State of Rhode Island 159
Mitchell, Hon. George J., U.S. Senator from the State of Maine 160

WITNESSES

- Sanderson, Richard E., Acting Assistant Administrator for External Affairs, Environmental Protection Agency; Robert Dawson, Acting Assistant Secretary of the Army (Civil Works); and Craig Potter, Acting Assistant Secretary, Fish and Wildlife and Parks, Department of the Interior 161
  - Mr. Sanderson's written statement 182

SEPTEMBER 18, 1985 (p. 193)

OPENING STATEMENTS

Chafee, Hon. John H., U.S. Senator from the State of Rhode Island 193
Mitchell, Hon. George J., U.S. Senator from the State of Maine 200
Stafford, Hon. Robert T., U.S. Senator from the State of Vermont 202
Symms, Hon. Steve, U.S. Senator from the State of Idaho 200

WITNESSES

Horn, William P., Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior; Robert K. Dawson, Acting Assistant Secretary of the Army, Civil Works; and Richard E. Sanderson, Acting Assistant Administrator for External Affairs, Environmental Protection Agency 201

STATEMENTS AND OTHER MATERIAL SUBMITTED FOR THE RECORD

- Corps of Engineers:
  - Responses to written questions from:
    - Senator Chafee 266
    - Senator Lautenberg 235
  - Information requested by:
    - Senator Mitchell 210
    - Senator Chafee 219
- Dilieto, Hon. Biagio, mayor, city of New Haven, letter to Senator Stafford 249
- International Association of Fish & Wildlife Agencies, letter from 247
- National Wildlife Federation, et al, statement before the Senate Armed Services Committee 297
- Office of Management and Budget, letter to 196
- Supreme Court brief, October 1984 236

Statements:

	Page
Strang, Hon. Michael, a Representative in Congress from the State of Colorado	268
Colorado Farm Bureau	270
Bay Planning Coalition	273
Chappell, Jesse	280
Marin Audubon Society	292
Mulvey, Patricia and James	294

OVERSIGHT HEARINGS ON SECTION 404 OF THE CLEAN WATER ACT

TUESDAY, MAY 21, 1985

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION,
Washington, DC.

The subcommittee met at 10:50 a.m., in room SD-406, Dirksen Senate Office Building, Hon. John H. Chafee (chairman of the subcommittee) presiding.

Present: Senators Chafee, Symms, and Mitchell.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Good morning, everyone. This is a hearing of the Environmental Pollution Subcommittee of the Committee on Environment and Public Works; an oversight hearing on the subject of section 404.

I apologize for being late. We were with the President down at the White House. Things went a little longer than expected.

This morning's hearing will focus on the Clean Water Act's section 404 Dredge and Fill Program which is administered by the Army Corps of Engineers.

I think everyone agrees about the importance of wetlands for a whole variety of reasons. They provide vital habitat for migratory waterfowl and numerous other wildlife species. They serve as production areas for important fisheries. Wetlands also serve as buffers from wave action and erosion and recharge and purify water supplies. In short, these ecosystems provide some of the most productive and useful land areas in our Nation.

Yet, despite the demonstrated values of these areas, we are losing wetlands at an alarming rate. I think we have said that here in this committee room many, many times. Of the approximately 215 million acres that once existed in the lower 48 States, only 99 million acres remained by the early seventies. Since 1975, we have been losing wetlands at a rate of some 300,000 acres per year.

I might say when you lose wetlands, they are gone forever.

The section 404 Dredge and Fill Program is the most important regulatory tool the Federal Government has to stem the loss of wetlands. Over the last 3 years, charges and allegations have been made by both private organizations and Government officials that the program is being rendered meaningless through so-called regulatory reform.

In 1982, the Army instituted new procedures and regulations changing the 404 program. These "reforms" were carried out under the mandate of the Vice President's Task Force on Regulatory Relief. According to that mandate, the reforms were to "eliminate delays * * * introduce a reasonable degree of certainty" into the program and "maintain essential protection" of the Nation's waters.

After reviewing correspondence and regulations between and among the Federal agencies here and in the field, I am concerned that there is little, if any, uniformity or certainty in the 404 program. I am concerned that it is not adequately protecting the Nation's waters.

Among the events which bear out my concern are the following:

EPA has terminated its memorandum of agreement with the Army because it feels "a number of issues have developed that bear upon EPA's ability to effectively carry out * * * its responsibilities under section 404 * * *."

The former Assistant Secretary of Interior charged, in a letter to the Army, that "Army's regulatory program is so flawed, it is no longer a usable tool to adequately protect wetlands." Interior has been trying to revise its memorandum of agreement with the Army since 1983, but negotiations have failed. The Fish and Wildlife Service estimates that in 1984 alone, 67,000 acres of wetlands were lost or degraded because of the constraints in the memorandum of agreement.

The corps and the EPA have been quibbling over a definition of "fill" material. Meanwhile, tons of fill material is being dumped into wetlands until a definition is agreed upon.

Failure to afford protection for isolated wetlands under the 404 program because the corps refuses to acknowledge a connection between the wetlands and interstate commerce.

Failure of the EPA and the corps to determine what wetland areas should be covered under the program. This has resulted in the loss of thousands of acres of wetlands.

A mitigation policy for fish and wildlife losses which does not adequately address biological principles and habitat evaluation procedures. I could go on, but we want to have time for the witnesses to address these and other issues.

Now, what is the bottom line here? Why are we here? I fear the 404 program is being streamlined and reformed out of existence. The only certainty in this program is the continued loss of wetlands under the current administrative policies.

The purpose of this hearing is twofold: First, to learn more about the program and reforms of the last few years; and, second, to identify administrative or legislative steps which may be taken to assure the integrity of the 404 program. I would hope the witnesses would address those questions today.

I am delighted that the ranking member of this subcommittee is here. Senator Mitchell, do you have a statement?

OPENING STATEMENT OF HON. GEORGE J. MITCHELL, U.S. SENATOR FROM THE STATE OF MAINE

Senator Mitchell. Thank you, Mr. Chairman.

I join you in welcoming the witnesses to today's hearing on section 404 of the Clean Water Act. I hope the hearing will contribute substantially to the effective administration of the 404 Program and the increased protection of one of our Nation's most important resources: wetlands.

Section 404 of the Clean Water Act provides a program for permitting the disposal of dredged or fill material from or in our Nation's waters. Administered by the Army Corps of Engineers, this section of the act is one of the most important regulatory tools to stem the loss of wetlands.

Few Americans would disagree that wetlands are of national importance. Waterfowl and other water birds are extremely dependent on wetlands throughout their life cycles, as are many fur-bearing animals. It is estimated that nearly two-thirds of the fish caught by American commercial fishermen are dependent on estuarine areas and their associated wetlands. These areas also buffer the effects of storms, purify water, aid in ground water recharge, and provide substantial flood control.

The State of Maine benefits enormously from its wetlands. Fish and wildlife nurtured by wetlands provide recreational hunting, fishing, and trapping opportunities for nearly 40,000 people in our State. These activities contribute nearly $120 million annually to Maine's economy. More than $7 million is received from fishing and hunting licenses alone.

Wetlands are also vital to the commercial fish and shellfish industry in Maine. Wetland tidal flats represent 48 percent of the intertidal habitats of Maine. Fisheries of the tidal flats rely heavily on organic material from adjacent coastal, estuarine, riverine, and salt marsh habitats. As a result, many of Maine's commercial fish species, including herring, mackerel, smelt, hake, scup, menhaden, flounder, cod, haddock, and perch are dependent upon wetlands for various stages in their life cycles. In recent years the commercial fishing harvest in Maine has totaled over 200 million pounds of fish and shellfish worth over $100 million.

Controversy surrounding the section 404 program has increased in recent years. The Fish and Wildlife Service, Environmental Protection Agency, and conservation groups have contended that the program is not adequately protecting wetlands because of regulatory changes implemented by the corps, and unworkable memoranda of agreement between the corps and these agencies. This hearing is an important step in identifying problems with the implementation of the 404 program, hopefully correcting them, and I look forward to hearing the testimony of today's witnesses.

Mr. Chairman, I apologize that I will not be able to stay for the full hearing. I look forward to reviewing the record of all of the witnesses.

Senator **Chafee**. Thank you, Senator Mitchell.

Let me just say that one of the points you made was a good one where you talked about wetlands being valuable for flood control. Anybody down the Mississippi and out in the Atchafalaya swamp area can see the value that wetlands have toward helping in flood control.

Senator Symms, we are delighted you are here. Do you have a statement?

OPENING STATEMENT OF HON. STEVE SYMMS, U.S. SENATOR FROM THE STATE OF IDAHO

Senator SYMMS. Thank you, Mr. Chairman. I have a brief statement.

I, too, welcome all of our witnesses, and I particularly welcome my friend Ray Arnett. I thought we had seen the last of him before this committee, I guess that is not true. We are delighted to have you back.

I would just say one cautionary thing to my colleagues here. Sometimes this works both ways. We have a flood situation in the Salmon River in Idaho where the Lemhi runs into the Salmon River. We are trying to get the river dredged out at a place now where there was a manmade alluvial fan that came in the river as a result of placer mining 100 years ago. We find there is a 50-acre piece of property up the river that has become a wetlands as a result of the manmade blockage in the river. This is one of the problems.

So what we have been doing is about every third year we have to pay about $4 million to have a flood in Salmon, ID. So I think the overzealousness for protecting these wetlands of 50 acres for some Canadian geese can cut both ways.

My only appeal is that we apply a lot of common sense to all of these things. I share the concern of the chairman and Senator Mitchell about the value of wetlands for the country in terms of wildlife habitat, flood control, and so forth. But I do think we always need to temper it with a rational, reasonable posture.

I think the problem is passing restrictive laws which causes problems like we have in Idaho now. We flood the people out in order to protect geese. I think that gets a little carried away.

But I look forward to hearing from all the witnesses this morning and I hope I can learn something.

Senator CHAFEE. Fine. I have a statement here from Senator Wallop which I will place in the record pursuant to his request.

[The statement follows:]

TESTIMONY OF HONORABLE MALCOLM WALLOP
SENATOR FROM WYOMING

TO THE SENATE SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

REGARDING SECTION 404 OF THE CLEAN WATER ACT

May 21, 1985

Mr. Chairman and Members of the Subcommittee:

As you review the status of section 404 of the Clean Water Act, and the programs of the Corps of Engineers and the Environmental Protection Agency under that Act, I ask you to carefully consider the delicate balance which Congress has traditionally maintained between federal water pollution control law, on the one hand, the the exercise of water rights which are allocated and administered under state law, on the other hand.

Section 404 is a dredge and fill permit system, the purpose of which is to reduce or minimize adverse effects to aquatic life caused by water pollution. Section 404 also comes into play when the purpose of the dredge or fill activity is to drain wetlands and convert them to drylands.

However, section 404 was not intended to place in the Corps of Engineers the authority to determine how much water can be diverted, stored, or placed to consumptive use by those who hold water rights which are allocated and administered under state law.

In 1977, Senator Hart and I co-sponsored section 101(g) of the Clean Water Act in response to the "Issue and Option Papers" drafted by the Water Resources Council (42 Federal Register 36787 [Friday, July 15, 1977]). That paper, among other options, suggested that federal environmental permit systems be utilized to require or impose stream flow levels (42 F.R. 36793). Recognizing that such a proposal would impair the water allocation and administration systems of the states, Senator Hart and I wished to ensure that the national water quality law would not be utilized as a water quantity law.

Since 1866, when the Mining Act was passed, Congress has consistently deferred to the water customs and laws of the territories and states. As explained in California v. United States, 438 U.S. 645 (1978), this deference has been subject only to the navigation servitude and reserved rights for federal land reservations. Section 101(g) was placed in the Clean Water Act as an express statement of congressional intent to continue this long tradition of deference to state water allocation systems.

Congress has encouraged the states to enter into compacts which allocate the supplies of interstate streams between themselves, so that each state can engage in long range planning and development without the fear of losing otherwise available supplies to neighboring states. Ratification of these compacts by the Congress has been taken as a solemn assurance that Congress will not interfere with state administration of compact entitlements.

Appropriation within state law systems, purchase and condemnation of water rights are means by which federal agencies can obtain water quantities to fulfill federally authorized purposes. Water rights obtained in this way are capable of state administration within compact entitlements.

But the use of section 404 on a project-by-project basis to deny or restrict water withdrawals, where the project proponent has a state-recognized water right to withdraw, store, and make consumptive use of the water, operates in derogation of state water administration.

Because section 101(g) was an express statement of legislative purpose, meant to guide the EPA, the Corps, and the courts when applying the Clean Water Act, throughout its provisions, I am concerned about a recent opinion of the Tenth Circuit Court of Appeals on March 26, 1985, in the case of Riverside v. Andrews, Nos. 83-2114, 83-2115, 83-2219, and 83-2230.

The facts of the Riverside case are these. Riverside Irrigation Company and Public Service Company of Colorado obtained from Colorado water court a water right for storage and use of approximately 60,000 acre feet of water on a small tributary to the South Platte River. The water stored in Wildcat Reservoir was to be used for irrigation and replacement of withdrawals for power plant cooling, and the quantities of water so appropriated were within Colorado's entitlement under the South Platte River Compact, executed between Colorado and Nebraska and ratified by Congress, 44 Stat. 195. Since Wildcat Creek is an intermittent tributary, with less than 5 c.f.s. annual average flow, Riverside and Public Service believed that they were entitled to proceed under the Corps' nationwide permit program.

However, the Corps of Engineers initially determined in 1980, following a biological opinion of the Fish and Wildlife Service, that large amounts of water were needed to "scrub out" woody vegetation in the Platte River channel in central Nebraska, and, consequently, the reservoir could not be built and operated unless the project sponsors agreed to 1) provide approximately 11,000 acre feet of water releases annually into Nebraska for the whooping crane habitat 260 miles downstream, or 2) apply for an individual 404 permit so that the impact of the reservoir on the crane habitat could be further reviewed.

The project sponsors objected and filed suit. In 1982, while the litigation was pending, the Fish and Wildlife Service determined that Riverside and Public Service Company could proceed with its project, without making flow releases or by-passing flows, if they undertook to pay for maintenance of a portion of the whooping crane habitat in Nebraska. In this subsequent biological opinion, the Fish and Wildlife Service determined that depletion of flows upstream from the crane habitat would make no difference in whether the woody vegetation could be scrubbed out. Crane prefer open, unwooded roosting sites in order to avoid predators. By 1982, the Whooping Crane Trust had demonstrated that woody undergrowth can be cleared by mechanical means.

Though he has authority under Section 5 of the Endangered Species Act to acquire water for the purposes of that Act, the Secretary of Interior did not take any action to appropriate, purchase, or condemn the water quantities he initially deemed appropriate, or to develop a program for clearing the brush and trees in the whooping crane habitat. Riverside and Public Service Company were simply told that they alone must pay the price for pursuit of a national goal.

It is simply unfair to place on individual water users the price of surrendering part of their water right or paying to exercise it, in order to achieve a federal purpose.

At its outset, Riverside was a clear case where section 404 was utilized in an attempt to require deliveries of water quantities, despite a state created water right for use of that water. Only after litigation was commenced did the Fish and Wildlife Service concede that water releases from the Wildcat Project would be ineffective in scrubbing out the channel in Nebraska and therefore would not be required. By this time, the project had been substantially delayed, and the project sponsors had dug in their heels regarding the Corps' asserted jurisdiction to inquire into the impacts of water depletions.

The Tenth Circuit Court of Appeals said, in its opinion, that Riverside and Public Service must apply for an individual 404 permit, if they wished to proceed with the project, because impacts on the critical habitat of an endangered species might be involved. The Court said that it was not deciding whether "the project will, in fact, have an adverse impact on the habitat of the whooping crane," only that the project sponsors must proceed with an individual 404 permit application. The Court also said that, pending processing of an individual permit application, it could not be determined whether Colorado was being denied "its right to water use under the South Platte Compact." Therefore, a ruling regarding the South Platte River Compact would be premature.

The Court also said the following about section 101(g):

> The Wallop Amendment does, however, indicate "that Congress did not want to interfere any more than necessary with state water management." National Wildlife Federation v. Gorsuch, 693 F.2d 156, 178 (D.C. Cir. 1982). A fair reading of the statute as a whole makes clear that, where both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation. Such accommodations are best reached in the individual permit process.

While this statement is correct so far as it goes, I disagree with any implication contained in the Court's opinion that the Corps may affix conditions to a 404 permit, in order to regulate the amount of water which may be stored, diverted, or consumed under a valid state administered water right. Section 101(g) was intended to preclude the exercise of such jurisdiction by EPA or the Corps in any provision of the Clean Water Act.

The "Issue and Option Papers" of the Water Resources Council had specifically suggested the use of Clean Water Act permits for this purpose, and we adopted section 101(g) to foreclose such a use of the Clean Water Act. A 404 permit is a CLEAN Water Act permit.

The Riverside conflict between the exercise of the Clean Water Act and a water right under state law is just what we attempted to avoid through section 101(g). If the Fish and Wildlife Service and the Corps of Engineers had not attempted, in the first instance, to condition the exercise of the Riverside water right under the nationwide permit system, it could have avoided long, expensive, and acrimonious conflict.

On April 16th of this year, I submitted extensive written testimony to this Subcommittee regarding the pending Endangered Species Act reauthorization. I pointed out that state/federal working groups have been formed, under the leadership of the Secretary of Interior, to resolve potential water use-endangered species conflicts in the Platte and Colorado River Basins. It appears that workable solutions are available in both basins which will avoid the temptation of federal agencies to utilize their permit authority to regulate water depletions which are authorized under interstate compacts, equitable apportionment decrees, and state water management systems.

These solutions involve mechanical brush and tree clearing in the Platte River whooping crane habitat and a native fish hatchery and stocking program in the Colorado River Basin, which can be implemented by the Secretary of Interior under sections 4 and 5 of the Endangered Species Act.

The project-by-project "ambush of the cowboys at the watering hole" approach, exemplified by the Riverside situation, need not and should not be repeated.

Many of our colleagues from states, other than the western states, are beginning to realize that water shortages are fast becoming of critical concern throughout the United States. I attach to this testimony an Associated Press news story concerning water rationing in 93 drought-stricken communities of New Jersey. This drought extends into New York and Pennsylvania.

We must not misuse our environmental laws to infringe upon the authority and ability of state and local governments to conserve and use water supplies for our farms, factories, and family life. In its 404 regulations, the Corps recognizes that "water supply and conservation," "energy needs, safety, food and fiber production, mineral needs, and "considerations of property ownership" are all important elements of the national concern. 33 C.F.R. Section 320.4(a)(1).

The Corps' recognition of these factors is fully consistent with the injunction of section 101(g) to avoid impairment of the water allocation systems of the states and the water rights administered thereunder.

The Corps and EPA can avoid unnecessary and counterproductive conflict between the federal environmental laws and the water allocation laws (including interstate compacts, equitable apportionment decrees, and state water laws) by carrying out their assignments under section 404 in a manner which accommodates these two great national goals: environmental protection, including control of deleterious water pollutants, and use of water under the water allocation management systems of the states.

Without careful thought and inquiry, some conservation groups condemn the western states for allegedly not recognizing instream flows for fish and wildlife as a beneficial use.

In the past, unfortunately, some of my colleagues have accepted these accusations without examination and, consequently, may be prone towards use of the federal environmental laws to regulate water use.

I draw the attention of my colleagues to a recent article which appeared in the Environmental Law Journal of the Northwestern School of Law of Lewis and Clark College:

> Six States - Alaska, California, Colorado, Idaho, Montana, and Oregon - specifically authorize the state, acting through a state water commissioner, water board, or natural resources department to set minimum stream flows for public interest reasons including fish and wildlife preservation. The other six - Arizona, Nevada, New Mexico, Utah, Washington, and Wyoming - apparently have no such mechanism. However, the same result may be achieved by denying new appropriations in a watercourse as not being in the public interest, a discretion built into most of the western appropriation water codes (although it is purely speculative that this mechanism is used). Most states that allow the institution of an

> instream flow by the state water agency allow other parties to petition the agency to establish an instream flow. Montana specifically allows "any U.S. agency" to apply for an instream flow which will be "reserved for the applicant" if it is in the public interest. Idaho essentially allows anyone to claim an instream appropriation, again to be approved if it is in the public interest.
>
> The conclusion from this summary is that it is not clear that any of these western states will definitely refuse every federal claim to an instream flow for fish and wildlife protection. Since most of the states now recognize "fish and wildlife" as a beneficial use, their agencies or courts may be willing to stretch their interpretation of "diversion" and "appropriation" to allow instream flow appropriations for such purposes. If not, many states have explicit mechanisms for setting minimum stream flows by petition to state water boards. States also might, in theory, set minimum stream flows rejecting new apropriations on a watercourse as not being in the public interest.

Shurts, "FLPMA, Fish and Wildlife, and Federal Water Rights," 15 Envtl. L. 115, 150 (1984).

I repeat that our pollution control laws and other federal environmental laws were not intended by Congress to supplant the water rights mechanisms which are established to obtain water for beneficial use.

The United States is vigorously proceeding to apply for reserved water rights and appropriative water rights throughout the United States. In many western states these claims are proceeding under the the terms of the McCarran Amendment, whereby legitimate federal water rights can be recognized and adjudicated, so that federal and non-federal water rights can be administered within an integrated system of water uses. This is the proper way for the federal government to proceed with regard to water necessary to carry out national programs.

Throughout our country, our livelihood and way of life depend upon wise use of our natural resources, water being the most precious of these, particularly in the western states. Let's not jeopardize salutary and effective mechanisms for administration of water uses. Implementation of a regulatory approach to water use is ill-suited to serve our national concerns.

Thank you for receiving this testimony. I look forward to working with you, Mr. Chairman, and my other colleagues, in the continuing effort to conserve and develop our water supplies and to protect our environment.

3/17/85

Drought-hit N.J. towns ration water

By The Associated Press

TRENTON, N.J. — Gov. Thomas H. Kean on Thursday ordered water rationing in 93 drought-stricken communities and extended restrictions on water use to 137 other municipalities.

New Jersey has imposed the most restrictive measures so far in a drought that also has depleted reservoirs in New York, Pennsylvania and Delaware.

Kean, who imposed a drought emergency declaration statewide, asked all other New Jersey residents to limit use voluntarily or face mandatory restrictions.

Officials are especially worried about this drought, New Jersey's worst in at least 55 years, because it has hit before the summer, when water use is heaviest. Usually, drought conditions emerge in late summer or autumn.

A ban on non-essential water use is in effect in New York, Westchester County, N.Y., and eastern Pennsylvania. Delaware has been under a drought warning, which called for a voluntary ban on such non-essential uses of water as washing cars, watering lawns and cleaning sidewalks.

In 93 New Jersey towns, beginning Friday, residents who use more than 50 gallons of water per person daily will face a surcharge of $5 for each 750 gallons above the allotment. Business will get an automatic 33 percent rate increase for all water they use.

Restrictions, which began in the 93 towns last month, were extended to 122 municipalities in the Delaware River Basin and 15 other northeastern towns.

Senator **Chafee**. All right, Mr. Arnett, we are delighted to welcome you back. Why don't you proceed.

STATEMENT OF G. RAY ARNETT, EXECUTIVE VICE PRESIDENT, NATIONAL RIFLE ASSOCIATION

Mr. **Arnett**. Thank you, Mr. Chairman. I do appreciate the opportunity to be here with you today and for the invitation you gave me to discuss with the subcommittee my personal views as an individual citizen.

I am sure you are aware until recently it was my privilege to serve the administration as Assistant Secretary of the Interior for Fish and Wildlife and Parks, Department of the Interior. In that position, it fell under my purview to ensure that the responsibilities of the Secretary with regards to section 404 of the Clean Water Act were carried out.

A number of agencies, including the Department of the Army, the Environmental Protection Agency, the Department of Commerce, and the Department of the Interior, are involved in carrying out the provisions of the Clean Water Act.

Section 404(q) of that act required the Secretary of the Army to enter into agreements with these agencies to accomplish the purpose of the Clean Water Act.

So, in June of 1982, the section 404(q) memorandum of agreement between the Secretary of the Army and the Secretary of the Interior was revised. I was one of the signatories of that document. And while there were some provisions in it that concerned me at the time, I was determined to do my best to make it work.

In addition, my counterpart in the Department of the Army at that time was Assistant Secretary of the Army for Civil Works, Bill Gianelli, who I have known and respected and worked closely with for a long time while in the California Department of Fish and Game, when I was the director and Bill was the director for Water Resources. That was during the Reagan administration. I had great respect for him and was delighted to have Bill Gianelli in his particular position to work with.

It was therefore my belief—and I expressed this to Bill Gianelli—that I was concerned with some of these new MOA positions, but that if there were any glitches that occurred in carrying out our respective responsibilities under the MOA, we would get back together and correct them.

What I am trying to point out is that I did not allow a way for renegotiation. That was a weakness on my part, I believe, by not putting in some kind of a renegotiation or cancellation agreement by either party with reasonable notice.

It was not long before we realized at Interior there were some serious problems with the MOA that, in my opinion, prevented adequate protection of the environment. Several meetings were held between myself and Bill Gianelli as well as others of our respective staff to attempt to obtain some changes in the MOA. Additionally, over the course of several years, many letters were exchanged that again, in my opinion, more than adequately pointed out the need for these changes. But, unfortunately, it was to no avail.

Finally, in the latter part of 1983 and beginning of 1984, the Fish and Wildlife Service carried out an analysis of some of the impacts that were occurring to fish and wildlife resources and their habitats as a result of the restrictive provisions that we saw in the then current memorandum of agreement.

Senator CHAFEE. Mr. Arnett, could you hold one moment? Do you have any copies of your statement?

Mr. ARNETT. I am sorry, sir. I have been traveling and I just put this together last night.

Senator CHAFEE. I have a copy. All right, go ahead.

Mr. ARNETT. I know the Senate requirements, sir, but I didn't have the opportunity to fulfill them. I am sorry.

Senator CHAFEE. That is all right. Go ahead.

Mr. ARNETT. I would like to digress momentarily, if I may, to that Fish and Wildlife Service analysis made in 1983 and 1984. If I may digress momentarily to say it is my understanding that the Department of the Army maintains that the Fish and Wildlife Service analysis was somewhat flawed in that 60,000 acres of the 69,000 acres shown in that Fish and Wildlife Service analysis as having been destroyed or degraded should not have been included because the permit for that acreage was denied by the Army. Well, that is true, but the subcommittee should note that the analysis was prepared in November and December of 1983 and it was presented to the Army in April 1984.

Now, my letter that quoted the 69,000 acres figure that would be affected by the project was sent to Army on November 7, 1984. It was the State of South Carolina, on November 28, some 3 weeks after I sent my letter, that first denied the permit for the 60,000-acre Carolina refinery project in question. And finally, after the project was successfully stopped by the State, the corps permit was denied on December 13, 1984.

So considering the above chronology, and in view of the fact that for the entire period of 1982 the memorandum of agreement had been in effect, this is the only time that the corps ever reversed itself.

Now, who stopped or who didn't stop this project is apparently a moot question. When the Fish and Wildlife Service made the analysis and sent it to Army on November 7, the 60,000-acre Carolina refinery project was still viable. Only after the State denied the permit on November 28 did Army revoke the permit.

So the analyses that I spoke to earlier of the impacts occurring to fish and wildlife habitat was conveyed to the Corps of Engineers in April 1984.

I met with Mr. Gianelli in a private session to try to resolve the issue and to obtain what changes we could. Well, unfortunately, Mr. Gianelli was leaving office at that time and the requested changes were never effected.

Now, for the record, Mr. Chairman, I would like to read and then explain the five changes that the Fish and Wildlife Service has consistently requested over the last 2 years. I believe that these would significantly strengthen the MOA's effectiveness.

The first one is that without extending the timeframe to issue permits, we would like to be able to provide for consultation between the field supervisor and the district engineer and/or the regional director and division engineer at the request of the Fish and Wildlife Service after the district engineer's decision to issue a permit.

One of the purposes of the MOA and, as I think you recognize, the Vice President's regulatory reform effort was to try to not allow these permitting processes to go on and on and on. We agree with that. We have come up with a timeframe we think is very acceptable. But we also ask for some more time available to us without extending the total time by taking from the Fish and Wildlife Service the time that it had to issue the permit and go back to the field. After the notice of issuance of intent was put out by the corps, then FWS would like to be able to go back and sit down with the district engineer or the division engineer and see if the Fish and Wildlife Service people couldn't resolve something before it had to be elevated.

The second proposal is about the "threats to elevate." We would like to eliminate that declaration in the Fish and Wildlife comments on a permit application, which is now required by the 1982 memorandum of understanding.

No. 3, we would like to provide criterion for elevation based on impact of fish and wildlife resources. It is really inconceivable that this criterion is not included in one of the reasons for elevation. I take full responsibility for not insisting on the inclusion of this at the time we did the 1982 MOA. It was a mistake.

The fourth requirement would be to require that the Assistant Secretary of the Army for Civil Works review determinations by the district engineers to issue permits at the request of the Assistant Secretary of the Interior for Fish, Wildlife, and Parks.

The fifth provision is to provide a renegotiation or a cancellation clause in the MOA at the discretion of either party—another important criterion that I unfortunately overlooked.

With regard to the first change, Mr. Chairman, what I spoke of earlier, and that is of providing for consultation between the Fish and Wildlife Service and the Corps of Engineers, over the conditioning of a permit, it seems so basic to me that it is difficult to understand how anyone could disagree with it. All the Fish and Wildlife Service is asking for is that the respective staffs at the field level have the opportunity to get together to resolve any differences before a permit is elevated to the level of the respective Assistant Secretaries of the two agencies. It was proposed to do this without extending the timeframe established to expedite the process.

The alternative to this condition is that issues that should be resolved at the field level are elevated to the level of the Assistant Secretaries, who neither have the time nor the knowledge of the specific issue to effectively cope with it.

The second provision, and that is to eliminate the "threat to elevate" in the Fish and Wildlife Service comments, also, to us, is most logical. To require the "threat to elevate" statement only serves to antagonize the applicants and requires the Fish and Wildlife Service to issue that threat, even before the Service knows what the district engineer intends to do or what the comments of the outside parties are.

The third requested change, and that is to provide a criterion for elevation based on the impact of fish and wildlife resources, seems to me to be the most basic of all. The Department of Interior and the Fish and Wildlife Service have no other reason to elevate or to request review of any permit except because of their concern for the adverse impact on the environment. Not to have a criterion for elevation based on environmental impact means that the Fish and Wildlife Service has to couch its concerns for the environment under one of the three other elevation criteria that really have no direct relationship to environmental protection.

The fourth change is also one that seems quite logical to me. Under the 1980 MOA, when the Assistant Secretary for Fish, Wildlife and Parks requested a review of a permit for environmental reasons, it was automatically accomplished by the Assistant Secretary of the Army. But under the 1982 MOA, the only thing that the Assistant Secretary for Fish, Wildlife and Parks could do was to request such a review, and then the Assistant Secretary of the Army had the option of either accepting or denying that request.

To me, the record speaks for itself. Of the 25 permits for which review was requested by me when I was then the Assistant Secretary of the Interior, the Assistant Secretary of the Army only agreed to review 11 of them. Of this number, only one, the South Carolina refinery permit, was changed for the benefit of the environment. That was only after the Governor of the State of South Carolina interceded and refused to grant a State permit for the project to be carried out. So at that time Army had no choice but to revoke the permit.

So finally, Mr. Chairman, the last change that was requested is the one that I have already addressed, that of providing a cancellation clause at the discretion of either party. I might add at this point that I recall that the Fish and Wildlife Service did prepare a side-by-side of the present 1982 MOA and a proposed MOA we would like to see, including the changes that were just discussed. I feel confident that the Service would provide you with a copy of that side-by-side analysis if the subcommittee were to request it. I am sorry I don't have a copy to give to you.

There is one additional issue that is very important to these considerations. That is the issue of mitigation.

In my letter of November 7, 1982 to Mr. Bob Dawson, who is the Acting Assistant Secretary of the Army for Civil Works, I mentioned in the last paragraph my great concern over the apparent corps policy of not requiring any additional mitigation above that which the applicant is willing to offer once the district engineer had determined that issuing of the permit is in the public interest.

The position of the Fish and Wildlife Service with regard to mitigation is published in the Federal Register of Friday, January 23, 1981. The publication states that the Service supports and adopts the definition as defined by the Council of Environmental Quality in the NEPA regulations, including the provision for, and I quote, "compensating for the impact of replacing or providing substitute resources or environment."

For the record, you may like to know that the CEQ mitigation policy is found in 40 CFR Part 1508, paragraphs (a) to (e).

So, in addition, the congressionally autnorized Fish and Wildlife Service Coordination Act specifically addresses the responsibility of the Secretary of the Interior and the Fish and Wildlife Service in this regard.

Section 2(a) of the Coordination Act states, and I quote again:

> Whenever the waters of any system or body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under federal permit or license, such department or agency shall first consult with the United States Fish and Wildlife Service, Department of the Interior, with a view to the conservation of wildlife resources by preventing loss and damage of such resource.

Section 2(b) of the Coordination Act goes on to discuss that the Secretary is to issue reports and recommendations on surveys and investigations conducted by the U.S. Fish and Wildlife Service concerning the loss or damage of such wildlife resources.

It further states that recommendations of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, and the results expected, and shall describe the damage to wildlife attributable to the project and the measure proposed for mitigation or compensation of these damages.

So in view of all of this, Mr. Chairman, I fail to understand why the reasonable recommendation that the Department of Interior makes should not, except in the most unusual circumstances, be fully accepted, irrespective of any public interest review.

Mr. Chairman, it is not my intention in presenting this testimony to further exacerbate the conditions between the Corps of Engineers and the Fish and Wildlife Service on these particular issues. I believe each of these agencies has its job to do, and in my opinion each is trying to the best of its ability to carry out its responsibilities as mandated by Congress.

I also know of the good relationship that has existed in the past, and I believe continues to exist, between the Corps of Engineers per se and the Fish and Wildlife Service.

However, I have been and continue to be deeply concerned about the inability of the Assistant Secretary level of the two agencies to resolve whatever differences we may have that continue to plague us over the conduct of the 404 Program.

I believe that pretty well covers the major issues that I see some concern with, Mr. Chairman. I will be happy to answer any questions that I can.

Senator CHAFEE. Mr. Arnett, I am going to put your letter to Mr. Dawson of November 7, 1984 in the record.

[The letter referred to follows:]

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

7 NOV 1984

Mr. Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)
Department of the Army
Washington, D.C. 20310

Dear Bob:

For nearly two and a half years, our Departments have been involved in an exchange of views relative to the Department of the Army's (Army) implementation of our interdepartmental Memorandum of Agreement (MOA). It is now abundantly clear that further correspondence on this issue is pointless and that Army's regulatory program is so flawed, it is no longer a useable tool to adequately protect wetlands.

In response to your August 30, 1984, letter, the proposals I have made relating to modifying the MOA are necessary; are supported by the accompanying data; do not extend the existing permit review timeframe, and are consistent with the Vice President's regulatory relief program. Unfortunately, they were rejected by your Office. As of this writing, Army's refusal to incorporate Fish and Wildlife Service (Service) proposals in those permits I requested be elevated has resulted in a direct loss or degradation of over 69,000 acres of wetlands. That total could have been avoided or significantly reduced had Army followed the Service's recommendations.

Furthermore, of the 23 permits for which elevation was requested but rejected by Army, four have resulted in lawsuits and four have resulted in Section 404(c) actions based on environmental grounds. This hardly results in a streamlined, timely, or predictable regulatory program, and these were primary goals of the Vice President's regulatory relief efforts. Such actions also serve to place the Administration in a needlessly negative light regarding environmental matters. As long as our Departments continue to "battle it out," this perception will continue.

It will not serve your purpose or mine to continue an eternal colloquy that only precludes issue resolution. It is imperative in the national interest that we meet to discuss revisions of the existing MOA to incorporate:

- A resource based elevation criterion. Protecting our national natural heritage is a matter of national significance that cannot continue to be ignored.
- Require decision review (elevation) at the request of the Assistant Secretary for Fish and Wildlife and Parks.

- After the Notice of Intent to Issue, reinstate negotiations between the Field Supervisor/District Engineer and/or between the Regional Director/Division Engineer without extending the overall timeframe.

- Delete "threat" language requirement from the Service's Fish and Wildlife Coordination Act Report.

- Provide for termination and renegotiation of the MOA, by either party, with a 30-day notice.

In addition, we find Army's policy that mitigation is not required "over and above that offered by an applicant," as expressed in your October 30, 1984, letter, to be unacceptable. We must establish a mitigation/resource loss prevention strategy that is in conformance with the requirements of the Fish and Wildlife Coordination Act, NEPA and Corps' regulations. This strategy must define in specific terms the "equal consideration" requirement and its relationship to the regulatory program. It must make concrete what is now a vague concept.

Supporting documentation is enclosed.

Sincerely,

Ray

G. Ray Arnett
Assistant Secretary for Fish
and Wildlife and Parks

Senator **Chafee**. That is a pretty strong letter. It says in part:

> It is now abundantly clear that further correspondence on this issue is pointless and that the Army's regulatory program is so flawed it is no longer a usable tool to adequately protect wetlands.

Two questions. First, what do you think we ought to do? Are the recommendations in your testimony all there are, or are there others that you would like to suggest?

Mr. **Arnett**. Those recommendations in the testimony are recommendations that have been there perhaps almost 2 years. It is just apparently a difference of opinion on how to operate that causes us to have these difficulties.

I very much respect the abilities that the corps has and the charges that the Congress has given it to do certain jobs. The corps does them quite well. At the lower level, I believe that there is great cooperation between corps personnel and Fish and Wildlife Service personnel.

I think that it would greatly strengthen the MOA if all, or at least some, of the more important of those five issues were included in a new memorandum of understanding.

The Fish and Wildlife Service feels very concerned about the fact that they are not now able to do the job they were charged with by Congress in protecting the environment. That is not to say that the whole program is of no value because I think it has been very much improved from what it was in 1980. The time to issue the permits has been greatly reduced. The cooperation between the corps and Fish and Wildlife Service for the most part is very well documented. There is basically a good feeling between the two.

But there are these minor issues that become larger in respect to mitigation that bother us considerably.

One of the things that is very difficult to understand, and I am not quite sure how to address this, Mr. Gianelli and I spent much time on trying to look at the cumulative impact of mitigation and loss of wetlands. The three criteria that we had for elevation were insufficient coordination I believe at the field level—in other words, if the field level people and Fish and Wildlife Service and the corps did not have adequate opportunity to review the case, then we could not ask for further review because the opportunity for coordination was insufficient—the second issue for elevation was that if there was any significant new information since issuance of the NOII, the notice of intent to issue, then we could ask for elevation; and then effectiveness of the effects on the national program.

So what I am getting at is when you are talking about mitigation and you are looking at a project of 50 acres in a project of 50,000 acres, you can look at that very specifically and say that 50 acres is not of national significance, and you have to agree it is not of national significance. But when you look at many thousands of permits that involve 50 acres, then it becomes of national significance on the cumulative standpoint.

I don't know quite how to address that.

Senator **Chafee**. I would hardly characterize the points you have raised as minor, because as you, yourself, say, it is abundantly clear that the Army's regulatory program is so flawed, it is no longer a usable tool to adequately protect wetlands.

Mr. ARNETT. I must say, Mr. Chairman, if I may, I may have been a little bit under the heat of battle, after having tried for 2 years.

Senator SYMMS. Mr. Chairman, it sounds like it was written by a Marine.

Mr. ARNETT. I don't think the MOA is so flawed we aren't protecting wetlands. I think I may have been a little heavy in the statement here.

Senator CHAFEE. I wouldn't quarrel with anything you said, except you split an affinitive.

Mr. ARNETT. You have a point.

Senator CHAFEE. Mr. Arnett, your basic point is that the MOA ought to be revised.

Mr. ARNETT. Yes, sir.

Senator CHAFEE. And that Fish and Wildlife is getting a short deal out of this.

Mr. ARNETT. Basically, yes, sir.

Senator CHAFEE. It seems to me some of the suggestions you make are fundamental, as you characterize them in your testimony. For instance, you don't even ask for any extension in the time to issue permits, but you do ask that in the time that is provided there be consultation either between the Fish and Wildlife Service field supervisor, and the district engineer or the regional director and the division engineer at the request of the Fish and Wildlife Service after the district engineer's decision to issue a permit. What is the matter with that? That seems to make sense.

Mr. ARNETT. I think you are going to have the opportunity to ask that same question of Mr. Dawson. I don't see anything wrong with it. I am confident that they perhaps do.

Senator CHAFEE. I get the impression that the Army Corps of Engineers got a good deal out of the MOA and isn't about to change it for anything. Is that a fair characterization?

Mr. ARNETT. That is a fair characterization.

Senator CHAFEE. Meanwhile, the wetlands are getting filled.

I think the point you made on the 69,000 acres, they will come back and say it was only 9,000 because later they revoked the permit. Did they ever get a permit or wait until South Carolina acted and then South Carolina turned it down and then they turned it down?

Mr. ARNETT. South Carolina turned it down and then the corps turned it down after they could not issue it, as I recall the scenario.

Senator CHAFEE. Senator Mitchell?

Senator MITCHELL. Thank you, Mr. Chairman.

Mr. Arnett, I have a series of questions, all on the same point, so let me ask them all and then you can respond to them in a single response.

I would like you to elaborate on your position that decisions to issue permits should be elevated based on concerns for fish and wildlife conservation, as opposed to purely procedural matters. Have you made this position clear to the Corps of Engineers? What was their response? And can you estimate—and if you cannot, perhaps someone else here can—the number of permits that would have been elevated if fish and wildlife conservation had been an eligible criteria for an elevation request?

Mr. ARNETT. In answer to the first part of the question, I believe it was made eminently clear that that was one of our criteria. The reason for it was our whole purpose was the environment. We didn't have that as a criteria for elevation.

As to how many could or could not have or may or may not have been elevated had we had that criteria, I would like to defer that to one of the members of the Fish and Wildlife Service you will be hearing from later. They would have the most current information. It just excapes my memory.

Senator MITCHELL. Did you make that position clear to the corps?

Mr. ARNETT. We did, sir, on many occasions.

Senator MITCHELL. What was the response?

Mr. ARNETT. It was never a negative, a no, to hell with you, we are not going to do it. It was always sitting down with them and trying to find out how it was disagreeable to them, or why it wasn't perceived to be of great necessity. They thought that the service wasn't having the troubles that apparently the Fish and Wildlife Service believed it was having. There was simply a difference of opinion.

Senator MITCHELL. Is it fair to characterize their response as not saying flatly no, but never agreeing to permit such criteria to be used?

Mr. ARNETT. I think so. I think the service always held out hope it would be understood. I have never seen any problem that two parties working together couldn't resolve, maybe never to the satisfaction of both parties completely or either one completely. That was always the hope against hope I had, particularly when Mr. Gianelli was there, and I must say with Secretary Dawson who is now acting. We got along personally very well. We never had any problems discussing with each other over the phone or in person any issues. Even though we were not always in agreement, I don't think we were ever disagreeable about it. It was just a matter of they having their position and we having ours and just not agreeing to it.

Maybe it is going to take a third party to resolve the issues I don't think the corps is in favor of destroying wetlands of the United States. I think they do sometimes, but not purposely. I don't think the Fish and Wildlife Service is a savior of all wetlands. As Senator Symms so rightly pointed out, sometimes the Fish and Wildlife people will get to the degree where every little piece of wetlands wants to be saved.

So that has to be modified, too. We have to be reasonable in any determination we make. Sometimes the biologists go too far and sometimes the corps is too far. There has to be a third party in there coming forward with a reasonable degree of development and preservation that can be effected when projects in the national interest that need to go forward.

Senator MITCHELL. Thank you, Mr. Arnett.

Mr. Chairman, I have no further questions of this witness.

Senator CHAFEE. Senator Symms?

Senator SYMMS. Thank you, Mr. Chairman.

Thank you, Ray, for your testimony here this morning. I have been perusing the very excellent statement that our colleague, Senator Wallop, sent over to the committee this morning that has been entered into the record. Senator Wallop makes the point that there is a conflict between the use of water, and it isn't just a western issue, where we have had water conflicts for years, as to whether the people are going to have the water or what use it will be with water rights.

He includes an Associated Press article about the Governor of New Jersey on May 19, 1985 ordering water rationing in 93 drought-stricken communities.

I just want to read a part of Senator Wallop's testimony and ask you to comment on it, Ray, because I know you are familiar with the conflicts in the west over the Riverside case, for example, where the judge rules much to the chagrin of many, that the city couldn't get the permit for water for people over the whooping crane problem.

But Senator Wallop says here:

> We must not misuse our environmental laws to infringe upon the authority and ability of state and local governments to conserve and use water supplies for our farms, factories, and family life. In its 404 regulations, the Corps recognizes that "water supply and conservation, energy needs, safety, food and fiber production, mineral needs, and considerations of property ownership" are all important elements of the national concern.

The Corps recognition of these factors is fully consistent with the injunction of section 101(g) to avoid impairment of the water allocation systems of the states and the water rights administered thereunder.

I assume, you basically agree with that, don't you?

Mr. ARNETT. Yes, sir.

Senator SYMMS. Isn't that a conflict, though, to your statement in the letter?

Mr. ARNETT. No, I don't think so, Senator. I think what we have to understand is it is sometimes very difficult to administer the laws as given to us by the Congress of the United States. They don't usually allow much flexibility when you are talking about endangered species. The law said that The Service will preserve the endangered species. It doesn't say that in critical dry years you can give up the whooping crane for the benefit of water use for people. It is very difficult for the biologists to make the determination of what is reasonable and what is unreasonable. The law is specific.

We in the Fish and Wildlife Service's administrative end of it do try to make that reasonable determination. Then there is always the opposing side that comes back to the press and public and the Congress and says, "Nope, it says right clearly in the Endangered Species Act that you shall do this that way," and generally the whooping crane, like in this case, wins out above the people.

Senator SYMMS. Let me go on and read one more paragraph of Senator Wallop's statement. I think it is very important. I think there is a sensitive balance here between what the corps is trying to do and the effort of the Fish and Wildlife Service in preservation of wetlands, which both are very noble goals, but Senator Wallop goes on to say:

> The Corps and EPA can avoid unnecessary and counterproductive conflict between the federal environmental laws and the water allocation laws (including interstate compacts, equitable apportionment decrees, and state water laws) by carrying out their assignments under section 404 in a manner which accommodates these two great national goals: environmental protection, including control of deleterious water pollutants, and use of water under the water allocation management systems of the States.

I guess what I am saying is that without some careful thought, I am not so sure that from my viewpoint the corps hasn't been fairly reasonable. What you are saying is maybe their system is not. What we are really trying to find here is just a balance; isn't that correct?

Mr. ARNETT. I am not saying the corps is unreasonable. I am saying they are reasonable to the degree they have their job to do. Sometimes it is primary to the Fish and Wildlife job, which is secondary as far as they are concerned. As far as Fish and Wildlife is concerned, their job is primary.

That is where the conflict comes. For the Fish and Wildlife Service to do its job in the most adequate manner they feel is required, compromising on endangered species or some other wildlife species is not acceptable as far as the service is concerned. The corps is just the other way. They say you know we have a project to build and we need to do it as cheaply as possible to benefit the public. Therefore, we (the corps) don't think a few acres lost here and there is that bad.

That is where the conflict comes.

Senator SYMMS. It is a cumulative effect you are talking about?

Mr. ARNETT. I beg your pardon?

Senator SYMMS. It is a cumulative effect?

Mr. ARNETT. Yes, sir. That is very hard to address because no one issue, or seldom does one issue have national significance. But the cumulative effect of many of them here and there have a significant impact on the total loss of wetlands, especially when we have already lost perhaps 60 percent of them.

Senator SYMMS. But in principle, with the importance of water rights, interstate compacts, State water rights, local needs for farms, factories, and people, and so forth, isn't the corps trying to protect a principle that there should be priorities? They are not too far off base on that, from my perspective, with respect to protecting western water rights. They have been at least careful in weighing that into the equation, which I think can't be overlooked. I understand what you are saying about the cumulative effects, but there is also this other issue.

Mr. ARNETT. The law doesn't give that kind of latitude, though, sir, to the Fish and Wildlife Department to make determinations when you are saying well, it is only going to affect three or four cranes. The law says very specifically Fish and Wildlife Service will protect the endangered species, whooping crane, period, not only two or three of them. That it is OK if they phase out of existence is unacceptable to the Service.

So we are being reasonable about it but we are not going to take a position that some are going to win and some are going to lose. The law does not allow that kind of flexibility in dealing with those kinds of issues. It (the law) says that the Service will protect the whooping crane, not 85 percent or 90 percent of them. The law very specifically says 100 percent of them. That is what puts the Service in a very difficult position.

Senator **Symms**. Thank you very much, Mr. Chairman.

Thank you very much, Ray.

Senator **Chafee**. Mr. Arnett, just briefly, in your letter you said:

> In addition, we find Army's policy that mitigation is not required over and above that offered by the applicant, as expressed in your letter of October 30, 1984, to be unacceptable. We must establish a mitigation and resource loss prevention strategy that is in conformance with the requirements of the Fish and Wildlife Coordination Act, NEPA and Corps regulations.

Tell us briefly about the mitigation, will you? What does the corps say about mitigation? Mitigation is restricted to what the applicant offers up?

Mr. **Arnett**. That came to my attention late in my term of office, sir. I never realized that policy existed. I don't know if it is in writing, but I think Mr. Dawson will be happy to respond in more detail than I am able to.

My position was that I had heard that the district engineer goes to the permitee and says, in effect—I don't know if it is always this way—how much do you think you want to give up for mitigation? He says "X" amount, either dollars or land or whatever it may be. Then that is an acceptable amount to the corps. It is sort of left up to the permitee to decide the amount he wants to mitigate. Then that is the acceptable amount authorized.

We don't agree with that. We frequently think that the mitigation should be in proportion to the amount of damage, at least to the degree that it can be mitigated.

Mitigation is a difficult issue. We believe in off-site mitigation. I am not sure that the corps does believe in that. Even though their policy doesn't preclude off-site mitigation, it is seldom ever allowed.

So the problem is that we feel that mitigation should be just that, mitigate to the extent possible for any losses of wildlife values. It doesn't always come out that way. For example, maybe the service is asking for 100 acres but the permittee is willing to give 10. That 10 acres is the mitigation then approved for in the permit.

We feel that mitigation should be based on not what the permitee wants to give but what is necessary to truly mitigate for any losses.

Senator **Chafee**. That seems to make sense.

Thank you very much, Mr. Arnett.

Any further questions, Senator Symms?

Senator **Symms**. No, thank you.

Mr. **Arnett**. Thank you, Mr. Chairman.

Senator **Chafee**. The next panel is Mr. Spotts, Mr. Reed and Mr. Baxter. Why don't you come up to the table, and starting on the left as you face us, Mr. Spotts, then Mr. Reed, and then Mr. Baxter on the right as you face us. Why don't we proceed in that order.

We will start with Mr. Spotts, who is from Region VI, EPA.

STATEMENT OF CLINTON SPOTTS, CHIEF, FEDERAL ACTIVITIES BRANCH, ENVIRONMENTAL PROTECTION AGENCY, REGION VI, DALLAS, TX

Mr. **Spotts**. Good morning, Mr. Chairman.

Senator CHAFEE. What is your official title?

Mr. SPOTTS. My title is Chief of the Federal Activities Branch.

Senator CHAFEE. Fine. Go ahead.

Mr. SPOTTS. Good morning, Mr. Chairman and members of the committee. My name is Clinton B. Spotts and I am Chief of the Federal Activities Branch of the U.S. Environmental Protection Agency, Region VI, in Dallas, TX.

I have worked for the Federal Government in this capacity for 12 years. The primary responsibilities of my office are to assist Federal agencies in carrying out their duties under the laws EPA is mandated to enforce.

For example, pursuant to the requirements of the National Environmental Policy Act, we not only prepare all EPA-generated environmental impact statements in region VI but also review all EIS's prepared by other Federal agencies.

In addition, pursuant to the requirements of section 404 of the Clean Water Act, we review the proposed permitting actions of the U.S. Army Corps of Engineers. We are responsible for federal assistance in the five southwestern States—Texas, Oklahoma, Arkansas, Louisiana, and New Mexico.

The nature of our regional 404 activities is as follows. Anyone who wishes to discharge dredged or fill material into waters of the United States must obtain a permit from the corps. These permits are processed at nine corps field offices in our region.

The permit process begins when an application is submitted to the corps. After an initial jurisdictional review of the application, the corps issues a public notice of the application and transmits that notice to EPA.

We review all public notices pursuant to the requirements of the 404(b)(1) guidelines during the 15- to 30-day comment period. Last year we reviewed 2,042 public notices. We provide official agency comment only on those we believe have potential significant impacts and where more reasonable location and design alternatives may be available.

Our official recommendations to the corps may be to deny the permit, modify the proposal, evaluate additional alternatives or request additional coordination with the applicant and interested agencies. Our comments are either followed or used to initiate an issue resolution process which, if unsuccessful, ultimately could result in a 404 referral under 404(q) or 404(c).

Our ability to review the number of public notices we receive within the required time frame and still assure that the 404(b)(1) guidelines are complied with is largely dependent upon informal, direct communication and coordination with the corps, other Federal agencies such as the U.S. Fish and Wildlife Service, the States, and the applicants. In districts with a great deal of activity, such as the New Orleans or Galveston corps offices, we attempt to meet regularly with interested agencies to prioritize the review of pending permit applications, discuss foreseeable problems and resolve outstanding issues.

In conclusion, my remarks have been limited to region VI activities under section 404 of the Clean Water Act. These activities represent only a part of our efforts to protect the wetlands. Under the authorities of the National Environmental Policy Act, the Clean

Water Act, the Clean Air Act, the Comprehensive Environmental Response Compensation and Liability Act, the Resource Conservation and Recovery Act, and Executive Order 11990, we routinely preserve and enhance the wetlands.

This concludes my prepared statement. I would be willing to answer any questions you may have.

Senator **Chafee**. Thank you very much.

Mr. Reed.

STATEMENT OF MAX REED, CHIEF, REGULATORY FUNCTIONS BRANCH, LOWER MISSISSIPPI VALLEY DIVISION, CORPS OF ENGINEERS

Mr. **Reed**. Good morning, Mr. Chairman.

I am Max Reed, Regulatory Chief of the Lower Mississippi Valley Division, Corps of Engineers. I have been involved in the corps regulatory program since 1966, when our responsibilities were limited to section 10 of the 1899 River and Harbor Act, and the only criteria we used to determine whether to issue a permit or not was the expected impact of the proposal on navigation.

In 1968, as a result of a judicial ruling, the public interest test came into use, and then in 1982, section 404 of the Clean Water Act entered the corps regulatory picture.

The 404 regulatory program has evolved into a major functional item in the work of the corps.

Senator **Chafee**. Could you explain to me what that means, a major functional item? What does that mean?

Mr. **Reed**. Well, it means that in 1966, I was the permit man for the Memphis district. The function took roughly one-fourth of my time. At the present time, the Memphis district has, I believe it is, eight full-time people in their regulatory function branch, and the work has become a major item within that district.

Senator **Chafee**. A major time consumer?

Mr. **Reed**. Pardon?

Senator **Chafee**. A major time consumer. It takes a lot of time.

Mr. **Reed**. Yes, sir. It takes a lot of the time of the district engineer and all of the people in the regulatory branch.

Senator **Chafee**. All right, thank you.

Mr. **Reed**. In LMVD alone, we issue approximately 950 permits annually under 404. That does not include the section 10 item. Virtually all of these permits are the end result of changes which the corps has suggested to the applicant to mitigate environmental impacts and contain additional conditions to reduce or mitigate the environmental impacts of the proposed activities during construction and operation of the permitted activity.

Each permit is carefully coordinated by means of a public notice with all interested State and Federal agencies, local entities, and the public at large. All comments are considered in the district engineer's final decision.

Permit applications are subjected to two tests. They must pass the 404(b) guidelines which were developed by the Administrator of EPA in conjunction with the Secretary of the Army, and they must pass a public interest test administered by the district engineer.

We deny very few permits because the applicants who apply for marginal permits usually withdraw their request when it becomes apparent that a denial is likely. Last year, for example, in the Lower Mississippi Valley Division, we denied only 22 permits under section 404.

We feel that we have made good progress in administering our responsibility to regulate the discharge of dredged and fill material into the waters of the United States. We manage to eliminate or reduce the impacts on water quality and avoid unnecessary delays to applicants at the same time.

As with any regulatory scheme, however, no one is completely happy with us. Each special interest group we deal with would have us do something differently. Some would have us permit the conversion of pristine marsh into subdivisions. Some would have us stretch the jurisdictional extent of the Clean Water Act to regulate all of the flood-prone areas of the country to better preserve the habitat of wildlife and fish. Some would have us prohibit fleeting of commercial barge navigation because of its aesthetic impact on waterways. Each major permit action seems to contain a blend of old issues and new wrinkles.

As our experience and expertise increase, we are making good progress in streamlining the program. For example, in 1982 we issued 1,700 permits under 404. This is in terms of the Lower Mississippi Valley Division. Two years later the number had been reduced to 950 or only 55 percent of the 1982 figure. Presumably this reduction is primarily due to the use of general permits for the more noncontroversial activities. No doubt a number of potential applicants never applied because of regular environmental constraints built into the program.

In summary, I believe we are accomplishing the stated goal of the Clean Water Act as well as can be expected within the limits of our authority and jurisdiction.

Thank you very much. I will attempt to answer any questions you might have.

Senator CHAFEE. Thank you very much.

Mr. Baxter.

STATEMENT OF CHARLES K. BAXTER, FISH AND WILDLIFE BIOLOGIST, U.S. FISH AND WILDLIFE SERVICE

Mr. BAXTER. Yes, sir. Thank you.

You all have been provided a written statement. It is short, but I will still try to summarize a little more.

My name is Charles Baxter. I am employed by the Fish ard Wildlife Service in Vicksburg, MI. I am the Field Supervisor of our field office there in Vicksburg in the Habitat Resources Program.

In that capacity I am responsible for the field level analysis, review and evaluation of 404 permits.

I have spent nearly 6 years in Vicksburg dealing with the application of the 404 permit program to the inland fresh water wetlands of the Lower Mississippi Valley. In March 1983, my office prepared a status report on the implementation of 404 in the Lower Mississippi Valley, which I understand you folks have a copy of.

From January to July 1984 my office represented the Department of the Interior on the Blue Ribbon Panel for Bottomland Hardwoods, which was convened by and at the direction of the Assistant Secretary of the Army.

I think through these activities and through our day-to-day involvement, I have been very much involved with the 404 program. I understand the major issues probably too well on occasion.

With that, I will be more than happy to answer any questions.

Senator CHAFEE. You went so fast I am still on page 1 of your testimony.

Mr. BAXTER. I am sorry. I am seldom accused of going too fast.

Senator CHAFEE. I need an interpreter for you.

Mr. BAXTER. Mr. Dawson might interpret.

Would it help you and if I provided a summary of some of those numbers and statistics that you may be studying there?

Senator CHAFEE. Just one minute. I don't know how you can summarize them any more than they are.

All right, why don't you just run through them. First you show the number of permit actions. What period is this? It is a little less than 2 years; is that right?

Mr. BAXTER. No, sir. It is approximately 33 months. It covers from October 1981 through March 1983. Then there is a 6-month void there in numbers. We pick up with data from October 1, 1983, up to the end of this past April.

Senator CHAFEE. During that time you had a total of 668 permits applied for?

Mr. BAXTER. Yes, sir.

Senator SYMMS. What happened to the other 6 months?

Mr. BAXTER. Can I get away with saying the computer ate the numbers? That is basically it.

Senator SYMMS. They weren't left out for any statistical reason to make it look different one way or the other?

Mr. BAXTER. No, sir.

Senator CHAFEE. So you had 668 applications, with no action there. What does that mean? The people withdrew?

Mr. BAXTER. No, sir. That means that when we received the public notice from the Corps of Engineers, we took no action on that public notice due primarily to manpower and time limitations. We did not review it. No action.

That was about 13 percent of the permits that we received. About 72 percent of the permits that we received we took action on, and our action was to express no objection to the issuance of those permits.

Then we get into the next category there; 12 percent of the permits we made recommendations that would have resulted in a modification of the permit.

Then, for the last category, denial, we recommended 3 percent of those public notices be denied.

Senator CHAFEE. So 3 percent out of the 668 were denied?

Mr. BAXTER. We recommended to the district engineer that they be denied. That in no way infers or says anything about what the Corps of Engineers did, what action they took.

Senator CHAFEE. What did they do?

Mr. **Baxter**. On those, I can't begin to give you an exact answer as to what they did on each of those 19. But to the best of my knowledge, of the permits that we have recommended denial, they have not denied any of them; they have been issued.

Senator **Chafee**. They have not denied them?

Mr. **Baxter**. That is correct.

Senator **Chafee**. Then further on you go on to say during the 6 years you have been there, you have attempted to use the MOA elevation process five times.

Mr. **Baxter**. Yes, sir; I should not have overlooked that.

Senator **Chafee**. The elevation would go to your own people, wouldn't it?

Mr. **Baxter**. Yes, sir; in the 6 years I have been in Vicksburg, we have recommended to folks in the Department—essentially we recommended to the Assistant Secretary, Ray Arnett, and Craig Potter—that they elevate six permits. In each instance, after a lot of review, a lot of briefings, a lot of deliberations, et cetera—they don't issue referrals lightly—they agreed that those six issues did warrant referral, and they were in fact referred to the Assistant Secretary of the Army.

So I guess the issue there is that of 668 permit actions, there were 6 that we were concerned enough to recommend to the Assistant Secretary of the Interior that he elevate, and he agreed with that concern and did elevate.

Senator **Chafee**. I see; presumably he took it up and the corps didn't accept it.

Mr. **Baxter**. Of the six permits, the referrals were either not accepted or they were, I would have to use the term "elevated," they were elevated back down to the division level for review.

Senator **Chafee**. I wouldn't say that was an elevation. I would say it was a descent.

Mr. **Baxter**. I will agree.

Senator **Chafee**. But in any event, nothing happened.

Mr. **Baxter**. That is correct.

Senator **Chafee**. I mean no action was taken to head off what you foresaw as damage.

Mr. **Baxter**. Of those six referrals, five involved bottomlands hardwoods. Our purpose in making those referrals was to try to define the policy issues, the resource issues associated with the clearing and conversion of bottomlands hardwoods; to get those policy issues considered at the policy level, that being Washington, DC, and try to seek some resolution of those policy issues.

Then, as I say, in each instance they were either sent back down into the bureaucracy, the division level, or they were rejected as not being appropriate referrals and were not accepted.

Senator **Chafee**. From your perspective, I wonder if you could describe to us the approach of Fish and Wildlife, the Corps of Engineers, and EPA to wetland delineation in the bottomlands hardwoods.

Mr. **Baxter**. Yes, sir; of course. The Fish and Wildlife Service has been in the wetland delineation business for several years and is involved now in our second national wetland inventory.

But speaking specifically to the regulatory aspects of wetland delineation, we participated rather closely with EPA during the

Avoyelles litigation in developing the Government's final wetland determination. As part of the Avoyelles litigation we worked closely with EPA. We developed a three-criteria methodology based on soils, vegetation, and hydrology; a methodology that is consistent with the regulatory definition of wetlands. That is the methodology that we use in wetland delineations. It is a technical methodology. It is a scientific methodology.

The corps, on the other hand, from my perspective, tends to use a methodology that focuses on one parameter, that being obligate hydrophytes. That is rather restrictive. Their delineation of wetlands is guided less by a scientific/biologic approach of what is a wetland and more by their policies of agricultural suitability. In other words, can this area with flood control and drainage be farmed, can it be converted to agriculture, those types of considerations.

Senator CHAFEE. That is the corps approach?

Mr. BAXTER. From my perspective. Recently the Wilmington District came out with a memo that basically said they don't define wetlands from a technical point of view. They define wetlands from a policy/public interest point of view.

Our approach would be that what is a wetland is a scientific, technical issue, and it is not an issue that should be a function of aqricultural suitability or development suitability, public interest, et cetera.

Senator CHAFEE. What do you say about that, Mr. Reed?

Mr. REED. That is quite a lot. The Corps of Engineers believes that we are to regulate the waters of the United States. What makes a wetland is water. So we look for water or evidence of water in its present condition.

The existence of a hydric soil that was laid down eons ago is hardly an indication of waters of the United States in the present day.

Let me digress briefly. The national wetlands inventory does not use the same definition of wetlands that the corps and EPA use, for whatever it is worth. The national wetlands inventory, it is my understanding, defines wetlands more in terms of fish and wildlife habitat.

The corps basically uses a vegetation test to determine where the wetlands are. The vegetation in our part of the world at least seldom lies about the regular occurrence of inundation or saturation. If the vegetation appears to be telling a story other than the real one, we will fall back to hydrology, gauge records, if we have them, or other evidence, and soils are a good indicator.

Were there any other specifics that you would like me to address?

Senator CHAFEE. I was thinking about that Tensas situation. As I understand it, what we have here is a difference in approach, that Fish and Wildlife defines something as a wetland based on certain tests they have and that you disagree with their methodology.

Mr. REED. Yes, sir.

Senator CHAFEE. Therefore, you don't call it a wetland. Is that correct? You don't find there is water there so, therefore, you don't find you have to exercise control. Is that fair enough?

Mr. **Reed**. Yes, sir, that is right. Last Wednesday, in the process of field testing the multiple-parameter approach or at least a version of the multiple-parameter approach, I personally visited a spot in the Tensas tract. It exhibited the characteristics of bottomland hardwood vegetation, wetland-type soils, but according to our hydrographs and our hydrologist's estimate, the area would come under inundation of the Tensas River less than once in 100 years.

Now, it is difficult for us to expand the commerce clause of the United States and the waters of the United States to less than once in 100 years frequency.

Senator **Chafee**. Mr. Spotts, what was your decision in that?

Mr. **Spotts**. I wasn't present, Senator, at the last Wednesday meeting.

Senator **Chafee**. But prior thereto. Didn't you, yourself, render a decision on what was wetlands and what wasn't in the Tensas area?

Mr. **Spotts**. We made some recommendations to the corps, Mr. Chairman, and I believe in the five tracts that were involved in that legal case, we found no problem with the corps' technical determination.

Senator **Chafee**. Mr. Reed, in your testimony you point out, first of all, that you never turned down a permit. Well, you did. "Last year we only denied 22 permits." But then you give as your explanation:

> We deny very few permits because the applicants who apply for marginal permits usually withdraw their requests when it becomes apparent that a denial is likely.

Do you have any statistics on how many permits were withdrawn?

Mr. **Reed**. Yes, sir. Just one moment, please.

Senator **Chafee**. In other words, 942 is the figure I have in mind.

Mr. **Reed**. The number of applications cancelled or withdrawn in the lower Mississippi Valley last year was 175.

Senator **Chafee**. Yes, here it is. "In the Lower Mississippi Valley, we issued approximately 950 permits." You denied 22. You say how many were withdrawn?

Mr. **Reed**. I said 175, but limiting that to 404 and a combination of 404 and section 10, it would be 120.

Senator **Chafee**. Mr. Baxter, what are the implications of the current 404 Program as far as enforcement to protect wetlands in your area? In other words, does 404 mean anything?

Mr. **Baxter**. The short answer to that question would have to be no, but then I guess any yes or no needs to be clarified.

Senator **Chafee**. The short answer is no.

Mr. **Baxter**. The short answer would be no, but I guess any yes or no would have to be clarified. The Fish and Wildlife Service spent a considerable amount of time documenting the loss of bottom land hardwoods in the lower Mississippi Valley prior to 1977. We found out that we had lost about 80 percent of the original bottom land hardwoods, that the conversion rates had averaged about 165,000 acres per year for a 20-year period.

As part of the blue ribbon panel effort, we updated those figures from 1978 through 1982 and found out in that 1978–82 period we were still losing bottom land hardwoods for clearing and conversion to agriculture at a rate of about 100,000 acres per year. There is still a significant wetlands loss.

The main concern that we would have is that when you look at where the few remaining bottom land hardwoods are, they are typically on the wetter sites from a hydrologic standpoint. They are what SCS would call a 3W or 4W or class 5 or 6W soils. Of course, I am waving something you haven't seen, but if you could look at SCS's natural resource inventory for the State of——

Senator **Chafee**. SCS stands for what?

Mr. **Baxter**. Soil Conservation Service.

The Soil Conservation Service's natural resource inventory for Mississippi. When you look at their data for those forest areas that are lying on 3W soils or wetter, they classify nearly 85 percent of that forest as either having low suitability for conversion to agriculture or zero suitability for conversion to agriculture.

So our concern is that we see in most instances the last of the forested wetlands, the wettest of the forested wetlands, being converted to what is quite often marginal or high-risk agricultural land.

Looking at the other side of that coin, of those 3W and 4W bottom land hardwoods that are left, SCS calls about 12 percent of them prime farmland. The rest of them do not meet the criteria for prime farmland.

So in my mind, the issue is basically one of losing the last remaining forested wetlands and replacing them with marginal agricultural areas that require a great deal of flood control, drainage protection. In other words, the Tensas that Mr. Reed mentioned a while ago, it is wet. It is not wet due to overbank flooding. It is wet due to alluvial clay soils where you get 60 inches of rainfall, and to farm it takes a great deal of ditching, excavation, which is going on over there right now. The Louisiana Department of Public Works is digging out the intermediate size bayous. The Corps of Engineers has $60 million on the books to dig out the Tensas River. That is what is involved in many instances in taking forested wetlands and trying to convert them to an agricultural use. Soybeans are not a hydrophyte is what it amounts to.

Senator **Chafee**. What is your answer to that, Mr. Reed? Is your answer that since it doesn't meet your definition of what is wetlands, therefore, it doesn't fall under navigable waters, and that is no concern of yours; is that right?

Mr. **Reed**. Not entirely. Some of the areas do fit the definition of wetlands. I would only point out that I believe I am correct in saying that prime farmland, there is very little of it, certainly very little in the lower Mississippi Valley.

The SCS categorizes the soil types in these bottom land hardwoods areas according to their restrictions. Most of them have a water constraint, which means that a certain amount of ditching, et cetera, is necessary to turn them into good farmland.

Those considerations are definitely part of our considerations when we are evaluating a permit that involves turning what we consider to be wetlands into a farm. For the most part, the areas that are wet, that exhibit the hydrophytic vegetation in the lower Mississippi Valley, are not suitable for turning into farmland. But the area that I described in the Tensas that I visited last week, with an inundation of less than one in 100 years and a soil that produces excellent soybeans, would make a good farm.

Senator **Chafee**. Senator Symms?

Senator **Symms**. No questions, Mr. Chairman. I appreciate the panel being here. I think we are running out of time. So I thank all of you for your testimony.

Senator **Chafee**. I just have a couple more questions.

I am not clear where you stand in all this, Mr. Spotts. Why don't you tell us where you stand on the approach to this.

As I understand it, EPA was involved in this Tensas woods business, and do you follow the Fish and Wildlife Service's definition or do you follow the Corps of Engineers' definition? What do you do?

Mr. **Spotts**. Mr. Chairman, we feel very strongly about employing the three-parameter approach to wetland determination as was highlighted very dramatically in the avoyelles case or the Judge Scott decision. That particular lawsuit has many names.

A key issue my staff and I must keep in the back of our minds when we are in the process of evaluating wetlands or implementing or employing the methodology is that there are many special interests that would like to be involved in determining what is a wetland or what isn't a wetland. We must stick as closely as possible to the technical side of what constitutes a wetland.

I am not that familiar with the Tensas tracts that you speak of, Mr. Chairman. I took over the 404 program about 3½ years ago. Consequently, most of that activity was prior to my taking over the 404 program. But as memory serves me, I understand that we made some comments to the corps and it is my understanding that those comments were accepted by the corps.

Senator **Chafee**. You got me. It just seems to me everybody wrings their hands over the disappearance of wetlands, everybody thinks they are important, everybody acknowledges that, and meanwhile, the destruction of them goes on unabated because one of the things seems to be a difference in definition. Mr. Reed says that some of it makes for good farmland and doesn't seem to be much wetlands involved. Mr. Baxter finds they are wetlands. I am not sure where you are coming from, Mr. Spotts, in all of this. It all took place before you got there, I guess.

I thank you for coming. I am not sure how much we got out of you gentlemen, but nice of you to come here. Thank you.

Mr. Dawson, would you sit to the left facing us, and then Mr. Gordon, Miss Cooper, and Mr. Potter on the extreme right.

Mr. Dawson, why don't you proceed.

STATEMENT OF ROBERT K. DAWSON, ACTING ASSISTANT SECRETARY OF THE ARMY, CIVIL WORKS

Mr. **Dawson**. Mr. Chairman, I am Robert K. Dawson, Acting Assistant Secretary of the Army for Civil Works. I appreciate this opportunity to testify before the committee.

I have a thorough statement which addresses in detail many of the issues which have been raised regarding Army's implementation of section 404 and the regulatory reforms this administration has implemented.

The program is a very complex one, far too complex in our judgment for the average citizen to cope with, and has been characterized by confusion and controversy.

We have faced the issue squarely and have clarified the lines of authority and accountability. We have asked the corps and the district engineers to take charge, and they have done so in an exemplary manner. My full statement demonstrates the district engineers do quite well at the very difficult task of weighing and balancing a wide range of disparate views to reach decisions which best reflect the public interest.

One of the things that concerns me most about some of the statements that have been made this morning are the aspersions which are cast on the 38 district engineers and the 1,000 or so public servants who do a very difficult job very well, the difficult job of balancing all competing interests, as Congress told them to do, without the luxury of looking at things from a single purpose point of view.

We have put the district engineers back in charge of the program, as the Congress intended, and have given them management tools to reach well-founded decisions in a reasonably expeditious time frame.

We have been charged with dismantling the 404 program through our regulatory reform. Quite the contrary is true. As my full written statement clearly documents, significant activities subject to section 404 are regulated far more effectively than ever before. We have achieved this through expeditious handling of routine actions as a result of an aggressive program of general permits, joint processing, and professional management, leaving time to focus on the more sensitive cases.

I believe that the negotiated settlement to the lawsuit challenging our July 1982 interim final regulations aptly demonstrates that given a proper opportunity, we can bring wide-ranging views together into an effective and efficient program. There are some major features of regulatory reform and proper program management which we have implemented which remain controversial. Clarification of lines of authority and responsibility has been seen as reducing the input and influence of Federal resource agencies. However, we have directed the district engineers and we continually emphasize that they should actively seek the views of the resource agencies and give those views full and fair consideration.

We have clarified the appropriate spheres of influence among local, State and Federal agencies and we will defer to other levels of government within their respective areas of responsibility as often as the law and regulations permit.

Throughout all of this we continue to focus on achieving wise use and conservation of natural resources by insisting on a multidisciplinary, well-balanced decisionmaking process. We have to keep in mind, Mr. Chairman, that the program has a direct impact on the individual private property owner who deals with the Federal Government on only very rare occasions. By making the process too burdensome, we promote noncompliance and alienation. The stacks of rules and regulations with which people must comply is truly imposing, and reasonable management techniques are necessary to help the public comply.

In the understandable and quite proper expression of concern over wetland losses and over the need for improved water quality generally, there is a real danger that we will lose sight of the regulated citizen who is simply trying to accomplish something with his or her own private property.

I would say that well over 50 percent of our permit applications annually are from mom-and-pop entities, individual citizens, not large organizations and companies with armies of lawyers, hydrologists, wetland scientists and economists to help them navigate the bureaucratic swamps of redtape, to make the scientific and technological determinations that Mr. Baxter referred to earlier, and sorting out all of these differing definitions and variations on the definitions.

Section 404 is not a Federal land use control statute. And again, in our understandable and quite proper concern over wetland losses, I hope we do not try to make 404 something it is not. And I submit the Congress never intended it to be a zoning and land use control law. The responsibility is historically left to local governments.

Senator CHAFEE. Now come on. No one is suggesting it is a zoning law. I think, Mr. Dawson, for you to throw in the term zoning here just to raise the hackles of everybody isn't acceptable. There is nobody on this committee that has ever suggested this is a zoning law. As you know, that is a red flag to be waved around. I just regret that you even brought it up here. Go ahead.

Mr. DAWSON. In advance of these hearings, Mr. Chairman, there has been extensive publicity of several letters to me from Mr. Ray Arnett who testified earlier. These letters were critical of the Army's implementation of a memorandum of agreement and of our program administration generally.

I have available to give the committee a detailed response to the alleged failures and believe strongly that they were based on erroneous data. We have provided the Department of the Interior with corrected data and are working with them to determine what real problems exist. We are not claiming perfection and we stand ready to make program adjustments when criticisms are substantiated.

Despite the significant achievements in reducing the time necessary to reach a decision from about 140 days to 70 days, much remains to be done which can improve program administration without sacrificing environmental goals. We continue to work on clarification of the jurisdictional issue that you have already touched on.

We have reached the conclusion, which is supported by the Office of Technology Assessment, that 404 is a poor mechanism to protect wetlands.

Less than 10 percent of annual losses each year are in any way attributable to the 404 program. Many unregulated activities that destroy wetlands do occur, which I think are regrettable. If further wetlands protection is needed, as we feel it is, new legislation may in fact be necessary.

We have not done all we can do to fulfill the congressional mandate to have the States administer the 404 program. The corps has increased its staffing and funding several times over in order to improve program implementation. However, we believe there are significant resources and interests among many States to assure more of the workload of program transfer mandated by Congress is made less onerous.

Senator **Chafee**. I tell you what, Mr. Dawson. We are short on time here. I should have announced in advance that we are going to give each witness 5 minutes to present statements. You have had longer than that. Since I didn't let you know in the beginning, why don't you try to work toward the end of your statement.

Mr. **Dawson**. I will conclude. Thank you very much, Mr. Chairman.

I would just conclude with this thought, that I am very much aware, Mr. Chairman, as I am sure everyone in the room is, of the great work you and this committee have done over many years to improve and safeguard water quality in the country. I respectfully urge the subcommittee to look at the facts of our regulatory reforms because I can say without hesitation that we are carrying out the law and the regulations as well. Our field people by and large are performing a very difficult job given them by the Congress very well.

Thank you again for the opportunity to clarify our position and correct for the record many misconceptions and erroneous data. I will be pleased to respond to any questions you may have.

Senator **Chafee**. Thank you, Mr. Dawson.

Mr. Gordon, we will have to restrict you to 5 minutes. All of your statements will go in the record, so don't worry about that, if they are longer than 5 minutes. Why don't you summarize it.

Go ahead, Mr. Gordon.

STATEMENT OF WILLIAM G. GORDON, ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Mr. **Gordon**. Thank you.

NMFS is the principal reviewer for NOAA in providing advice and a consultation function to the Federal water resources construction and regulatory agencies under the provisions of the Fish and Wildlife Coordination Act. Under the advisory provisions of the Fish and Wildlife Coordination Act, we review and comment on Federal projects or federally authorized activities which propose to alter or develop the Nation's water resources.

In the water resources area, we review exemption and license applications before the Federal Energy Regulatory Commission, Federal projects constructed and operated by the corps and the Bureau of Reclamation, lease sales by the Minerals Management Service for oil and gas development on the Outer Continental Shelf, and Environmental Impact Statements for major Federal actions which significantly affect the quality of the human environment.

This advice is given to allow other agencies to assess the potential effect of their actions on fish and wildlife resources and their habitats. Where appropriate, we recommend alternative, less damaging measures for development. We may also propose mitigation measures and in some instances habitat restoration or enhancement activities.

The National Marine Fisheries Service developed and implemented a Habitat Conservation Policy which was published in November 1983. This policy was developed and implemented because we recognize that under the Magnuson Fishery Conservation and Management Act we are the sole Federal managers of the vast resources within our 200-mile exclusive economic zone. As the principal fishery agency, we recognize the need to link the productivity of a healthy environment to the fishery resources otherwise we will not have them or they will be unfit to eat.

We comment on projects which require the Corps of Engineers permits under section 404 of the Clean Water Act and under section 10 of the River and Harbor Act. In 1984, we reviewed over 7,000 Corps of Engineers permit applications for dredge and fill activities, nationwide. Of these applications, no objection was raised to issuance of 6,100—over 88 percent—and modifications were recommended on 900 (12 percent). Most reviews are completed in a timely fashion. Only 44, or six-tenths of 1 percent, of our reviews were provided after the 30-day review period.

Also, in 1984 we requested that one permit case be elevated for resolution under provisions of the section 404(q) interagency Memorandum of Agreement. The case involved a proposal to impound 900 acres of wetlands in South Carolina. The Assistant Secretary of the Army denied our request to reconsider this case.

In this same period, 16 permits were issued over our recommendations of denial, however, we did not seek referral under the MOA. There are now, and will continue to be, occasions when we must firmly oppose proposals to develop wetlands and other aquatic habitats.

The 7,000 permit applications that we reviewed proposed over 14,000 acres of habitat alteration, including 3,600 acres of dredging, 6,700 of filling, and 4,000 acres for impounding, draining, riprap, and so on.

We recommended modifications, alternatives, and mitigation measures for 9,800 acres of proposed alteration, of which 4,200 acres were proposed for filling.

This year we distributed $50,000 to each of our five regions to prepare follow-up reports on the results of our recommendations to the Corps of Engineers. We expect the reports early in 1986.

In 1984, we recommended over 2,700 acres of mitigation to overcome losses attendant to permit issuance. Over 80 percent of this acreage was for restoration of habitat by means such as reopening isolated wetlands and open-water areas into nearby estuaries and the sea. A smaller amount was devoted to generating entirely new habitat through means such as converting dry land into subtidal or intertidal wetland. It is in the area of habitat restoration and creation where we hope to make the next important strides in fisheries habitat conservation.

As a result of national recognition of the importance of wetlands, the overall rate of coastal wetland loss caused by development on nonwater-dependent projects has declined in recent years. However, there continue to be losses of coastal wetlands in parts of the United States from water-dependent projects, such as port and harbor expansion, petroleum exploration and production, and navigation and mooring facilities.

The importance of estuaries and their associated wetlands to marine fishery resources cannot be overemphasized. The majority of U.S. fish and shellfish species of commercial and recreational importance spend a critical part of their life in these areas. Such species are referred to as estuarine-dependent. Almost 70 percent of the U.S. harvest of commercial species have this characteristic. These include shrimp, salmon, menhaden, blue crabs, flounders, oysters, and clams. Each year the commercial harvest of these and other marine species contributes about $12 billion to the U.S. economy.

Many marine recreational species are also estuarine dependent.

Senator CHAFEE. Why don't you wind up.

Mr. GORDON. Examples are salmon, steelhead trout, striped bass, bluefish and red drum. An estimated 18 million anglers enjoy marine recreational fishing and contribute another $8 billion annually to the U.S. economy.

Stress in this area is growing and the use is growing. I would point out that we can maintain these on a continual basis if we are a wise manager and conservator of such resources.

Senator CHAFEE. Thank you very much.

Ms. Cooper.

STATEMENT OF JOSEPHINE S. COOPER, ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS, ENVIRONMENTAL PROTECTION AGENCY

Ms. COOPER. Thank you, Mr. Chairman.

EPA has assigned high priority to improved wetlands protection under section 404, recognizing the vital importance of wetlands and the continuing rate of wetland loss.

Because of the high priority we attach to this issue, we have been taking a number of steps to make EPA's 404 program stronger and more effective. We have consolidated EPA's program internally to provide for more efficient management. We have increased the levels of staffing and funding both in fiscal year 1985 and in our fiscal year 1986 budget request. We are moving to make a number of policy improvements which I will discuss.

First of all, clarification of elevation procedures. The shared responsibilities under section 404, differences in interpreting the (b)(1) Guidelines, among other things, mean there may have been differences among agencies concerning permit issuance in specific areas. This makes it essential to have smoothly operating procedures through which EPA objections to proposed issuance of a permit by a corps district can be elevated for review at a higher level. The shape and nature of these elevation procedures is very important in providing EPA an opportunity for appropriate review where it has serious reason to disagree with a corps district engineer's decision.

EPA has not made routine or frequent use of elevation. Since we have been operating under the 1982 agreement, we have referred a total of nine cases to Army for elevation. Because we have these concerns, we have proposed to Army a number of adjustments to the existing memorandum of agreement.

We have been negotiating with the Army since the memorandum lapsed on December 1, 1984, but have not yet reached agreement. However, we and the Army have agreed informally to operate in accordance with the provisions of the 1982 memorandum until such time as we can resolve the outstanding issues.

The changes we consider necessary would increase the opportunities for working out differences between EPA and Army at the field level. They would reduce the number of requirements for referral to headquarters, with the attendant delays and problems involved in attempting to get resolution at that level.

Section 404(c) is another issue of concern. The 404(c) provision provides an opportunity for EPA to, in effect, veto a proposed permit issuance by the Corps of Engineers under criteria specified in the act. From the beginning of 1983 to the present, EPA has initiated seven 404(c) actions.

Of the 404(c) actions initiated since 1983, two have been completed by prohibiting or restricting the discharge of dredged or fill material, one was withdrawn, and four are still pending.

Advance designation. We believe that 404(c) could be a much more effective device to designate certain areas as unsuitable for dredged or fill material discharge when used in advance of permit requests.

Therefore, we have been looking carefully at the potential of advanced designation of areas in which disposal of dredged and fill material would not be permitted. This concept is based upon a recognition that some wetlands are more threatened, have higher societal values, or are rarer, and require an extra measure of protection.

If we can make even a few of those determinations in advance, with the appropriate State and local participation and cooperation, we will do a much better job of forestalling or precluding delay and controversy in the regulated community.

We are in the initial stages of exploring that concept in a number of specific areas.

Wetlands priorities. As I have already indicated in my remarks on advanced designation, we do see opportunities for moving the program from a reactive to a proactive one. In this regard, we think it is particularly important to give special attention to high value wetlands which are threatened by or experiencing significant losses. We have asked our regions to attempt to focus their efforts by identifying those areas in which the discharge of dredged or fill material is a priority concern and to develop a more coherent program strategy for dealing with the problem in those areas.

The bottomland hardwoods situation is an example of the need for a coherent strategy for preventing wetlands loss. Bottomland hardwoods provide very important wetland values in terms of fish and wildlife habitat, flood buffering, water quality protection and recreation.

A recent court decision clarified that much of the bottomland hardwoods area is wetlands within the meaning of the Clean Water Act. The clearing activities raised in that case were also found to be subject to regulation under section 404. We are very pleased that the Corps of Engineers has recently issued a regulatory guidance letter clarifying for its districts how these clearing activities should be regulated. We have also asked our regions to formulate interim strategies for doing a more effective job in their permit review and related responsibilities relating to bottomland hardwoods.

Enforcement under section 404 is unique because of the coadministration of the program by the Corps of Engineers and EPA. The bulk of EPA actions regarding 404 program enforcement should be directed towards discovery and remedy of unpermitted discharges.

In addition to enforcement authority for permitted discharges, the corps also has enforcement authority regarding unpermitted discharges, and so close coordination with the corps is essential to assure that the agencies work together.

As part of our effort to increase the effectiveness of 404, EPA is working to strengthen its enforcement program in a number of ways. We are developing model 404 pleadings to help our regional staffs become familiar with such tools, and we are designing a 404 enforcement strategy guidebook which will define priority areas for EPA enforcement action.

Reflecting his commitment to wetlands protection and the need for a more effective strategy Administrator Thomas has asked that we explore the relationship between wetlands protection, and other EPA priority concerns, such as nonpoint source controls, estuarine protection and ground water protection. We are also looking to relate the 404 program to other wetland protection programs, such as the floodplain management activities of FEMA, the State coastal zone management programs, and the wetland acquisition programs of the Department of the Interior.

I have reviewed in a very rapid fashion the various actions EPA has underway to improve our effectiveness in providing environmental guidance for wetlands protection.

Thank you very much.

Senator CHAFEE. Thank you, Ms Cooper.

Mr. Potter.

STATEMENT OF J. CRAIG POTTER, ACTING ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR

Mr. POTTER. Mr. Chairman, even though I only have a four-page statement, I am not sure I can read it in 5 minutes, and I am not sure that I want to anyway. Maybe I can just make a few points.

Senator CHAFEE. There is nothing wrong in summarizing these statements.

Mr. POTTER. I would like to do that.

Basically the first two pages of my statement outline factual background information that has already been discussed in detail. I would refer you to the last two pages where we discuss our view of the importance of mitigation. Since I expect we will be discussing that, I will not say anything other than that we feel very strongly that there is a need within the Federal family for a more consistent mitigation policy. We have stated that repeatedly.

This has been a subject for CEQ referral recently where CEQ has made their views known. I think it is good public policy to develop a more consistent mitigation policy.

Let me make a few points, if I can, by summarizing my view of this whole situation.

I think that what has happened is that the Assistant Secretary of the Army for Civil Works has insisted, largely as a result of the Vice President's 1980 regulatory reform mandate, that the corps be given control of section 404 activities. That has occurred. We have understood their problems and we have tried to cooperate with them in resting control of this program from a regulatory reform standpoint.

From our point of view, and from the point of view of our many constituents, with that control must go certain responsibilities, consistent with law, consistent with other program responsibilities that we have, and with the need for good public policy. These essentially relate to fish and wildlife resource management considerations.

Summarizing, simply, I think they break down into about three different categories. The first one is the need for some sort of real resource orientation within the 404 MOA process.

Senator CHAFEE. What do you mean by resource orientation?

Mr. POTTER. The relationship between the resources affected by the program and the process itself, that is the permitting program, needs to be defined, as Mr. Arnett said earlier in his statement.

We have three criteria for elevation. We have never adequately addressed the relationship between those criteria and the impacts of the program on wetlands and resources that we have responsibility to manage.

The second point is that we feel a need to tighten up the relationship, and this really relates to the first one, between mitigation and the public interest concepts that appear in the process, consistently, which I already mentioned.

The third point would be a need to examine the effects of 404 permitting activities relative to the broader cumulative impacts question.

I think I can summarize simply by saying that if the corps does not do these things, they will not get the support of the responsible segments of the environmental community, and they will not get the support of the others who have to manage these resource areas, and they desperately need that support if they are really going to make this program work.

That is how I would summarize it.

Senator CHAFEE. Thank you very much.

Senator Symms?

Senator SYMMS. Thank you very much, Mr. Chairman.

I appreciate the testimony of all of the witnesses here this morning. Mr. Dawson, I would like to hear your point of view. What are some of the benefits of regulatory reform?

Mr. DAWSON. Senator Symms, I think one of the big benefits has been to take our limited personnel and get them focused on the most important permit applications. We have thousands of these a year. What we have tried to do through the use of general permits and other mechanisms is to get our limited people so they can spend the bulk of their time on those important matters.

I think by giving the public a better response time. We are now averaging about 75 days to give an answer yes or no, whereas 4 years ago we were averaging 150 days. I think that improved response to the public gives them a greater confidence in their Government. I think it will help us have better environmental enforcement because they will feel it is a program that works well.

Senator SYMMS. What else does someone have to do to get an approval for a 404 permit? What other obstacles are there besides coming to the corps to get the permit?

Mr. DAWSON. Well, they are legion. If we stack them all here on this table, the table might break. But you are looking at things like local authorizations, State authorizations. Each of these thousands of permits has to get a State 401 water quality certification, a coastal zone consistency determination in those coastal areas, Endangered Species Act compliance, and I am probably missing some, wild and scenic rivers.

Senator SYMMS. So there is a stack of other requirements?

Mr. DAWSON. Yes, sir.

Senator SYMMS. In the *Salmon, ID* case I mentioned earlier, that is what the corps informed me of. Our grandfathers would have already had it fixed, and here we are fooling around with bureaucratic democracies allowing a town to flood twice, then we know how to stop it. There were some 10 or 15 Federal laws plus State laws to try to comply with.

Mr. DAWSON. Yes, sir.

Senator SYMMS. It is a problem.

Miss Cooper, are you aware of any instances of failure of the corps to comply with any laws regarding coordination and consultation?

Ms. COOPER. Any specific cases?

Senator SYMMS. Yes; There has been a little criticism leveled at the corps here. I might ask Mr. Potter the same question. Do you know of any instances where you feel the corps has truly failed to comply with the law as far as coordinating and consulting with you or with other agencies in order to issue these 404 permits? Specifics.

Ms. COOPER. In many cases our regions have complained to us that they disagree with findings by the corps that the permits are in compliance.

Senator SYMMS. Are you talking about asking them to go beyond the law or stay within the law?

Ms. COOPER. Asking?

Senator SYMMS. I haven't been convinced that there is any case where the corps has done anything, where they have gone——

Ms. COOPER. Outside the law.

Senator SYMMS. Where maybe there is criticism, but people are asking them to go outside the law. The law, in my view, clearly states there has to be a priority of the use of water, and that if the corps stays within that, are they being criticized?

Ms. COOPER. I am not aware of specific cases outside the law.

Senator SYMMS. In other words, they are doing what you think the charge of the law is.

Ms. COOPER. I think you have to look at it in terms of degree. I think you have to look at it in terms of scientific judgments and how far along a spectrum you move.

There is some genuine scientific disagreement out in the field, and there may be disagreements with regard to the procedure that is gone through as well as whether adequate coordination has really occurred. My impression is and my experience with the corps is that they are not operating outside the law. But there are differences of opinion regarding the degree to which they are complying with guidelines.

Senator SYMMS. Mr. Potter.

Mr. POTTER. An earlier example that Mr. Arnett talked about is an example, I think, of where we do not feel that the Fish and Wildlife Coordination Act has been complied with. That is the *Bakersport* case, which stated the mitigation policy that Ray raised.

The Coordination Act requires that the corps give full consideration to reports and recommendations of the Secretary of the Interior in order to obtain maximum overall project benefits. Those are the words of the statute.

Our view of those words is that obtaining maximum overall project benefits may require mitigation beyond, over, and above what the COE public interest review process requires, and if so, it should be done.

In the case of Bakersport, the policy was announced that mitigation, once the public interest has been determined, would not be required beyond what the applicant was willing to do. I think that is a good example of where we differ on the interpretation of the law.

The real problem, I think, is that the laws are not that specific in some cases.

Senator SYMMS. Back to the question of regulatory reform. It appears to me that we have several ways that the public is protected. They can go out and block development. They can take section 7 of the Endangered Species Act, for example, and claim that there is some species being damaged. That may take 25 years to prove that point. It just goes on and on.

I am just trying to get my handle on this. But it appears to me that this regulatory reform process is moving in the right direction. But are you telling me it isn't moving in the right direction?

Mr. POTTER. I think in some cases we feel that way. I do not think the issue is the Endangered Species Act issue you cite. I think the issue is how the corps brings consideration of these other factors into play. They have the opportunity and they sold this not in to us during our consideration of their 404 regulatory reform effort, that they can establish regional conditions. The district engineers have a lot of opportunity to do things with these permits. We have not seen enough consistency there from our viewpoint between what was done and what actually could be done under their laws.

There are specific examples other than what I have discussed. One of them is the question of who makes jeopardy determinations under the Endangered Species Act.

Senator SYMMS. How do you treat the enforcement then?

Mr. POTTER. Enforcement under the Endangered Species Act is specifically mandated as a responsibility of the Fish and Wildlife Service, very clearly.

Senator SYMMS. I guess I must come back to Senator Wallop statement that I referred to earlier. I thought Mr. Arnett said he agreed with, and that is:

> We must not misuse our environmental laws to infringe upon the authority and ability of state and local governments to conserve and use water supplies for our farms, factories, and family life. In its 404 regulations, the Corps recognizes that "water supply and conservation," energy needs, safety, food and fiber production, mineral needs, and considerations of property ownership" are all important elements of the national concern.

It sounds to me like that is what they are doing.

Mr. POTTER. Our point is that they are not going far enough beyond that in addressing the relationship between the resources and their role as part of the national interest. They have specifically outlined these other factors which we all agree with as being in the national interest.

Senator SYMMS. So are reforms necessary then to get enforcement compliance straightened out with respect to the coordination of all of this?

Mr. POTTER. We feel that they are, and we have discussed this many times with the corps.

Senator SYMMS. Would either one of you want to comment on that?

Mr. DAWSON. I think, as Mr. Potter has indicated, Senator Symms, we have been working together. We have certainly not agreed in many cases. But I think the law does give the corps the ultimate responsibility in many of these areas.

I think what we have to do, and perhaps do a better job, is emphasize to our field people they really must give a full and fair consideration to the views of the other agencies. However, once they have given that full and fair consideration, it is their awesome responsibility, very difficult responsibility, to make the decision.

I think they are doing that very well, and within the law, going back to your question.

Senator SYMMS. Mr. Gordon.

Mr. GORDON. Just a couple of points. I think Miss Cooper was correct when she indicated that the corps had for all intents followed the law pretty closely. There are two Federal decisions I am aware of in which the judge said they had erred procedurally. But I think that can occur in any Federal agency.

One point we have recently become concerned with is the issuance of general permits to the states. While we are in favor of the State having this authority, I think that the States should consult with us under the Fish and Wildlife Coordination Act. The corps cannot delegate our responsibility.

We have an example where that has been done. Although the delegation is only for 1 year, the initial proposal was for 5 years. We think we are losing an opportunity to consult on these projects by delegating the general permit authorities to the State.

Senator SYMMS. Do you want to comment, Mr. Dawson?

Mr. DAWSON. Thank you, Senator. Very quickly.

The idea of a State program general permit, to keep an applicant from having to go to the Federal Government and the State to essentially get the same thing, is a very central aspect of our reforms. I think it is an empty exercise if we keep too many strings attached. The point ought to be if the State is doing a good job regulating the same activity, then we shouldn't hold too many Federal strings or it is a pointless exercise.

Senator SYMMS. Thank you very much, Mr. Chairman.

Senator CHAFEE. Thank you.

Senator SYMMS. Thank you all very much.

Senator CHAFEE. I tell you what I am going to do. I would like to ask just this panel, not the others—the others are excused permanently—but this panel, if you could come back on June 11, which is a Tuesday. Is there any reason any of you can't come back then? Because we have some real problems here. I want to spend some time on the statements that were read, and that were given, and spend some time talking with each of you because we have the principals here. Everybody seems to recognize the problem, but we are not getting very far.

We will let you know the time. Usually on Tuesday we have to go down to the White House, but it may not be that Tuesday.

Ms. COOPER. Mr. Chairman, is it appropriate at that hearing if we just continue from here or do you need new statements?

Senator CHAFEE. No, no, don't bring any new statements.

Ms. COOPER. I just wanted to be sure.

Senator CHAFEE. Just bring yourselves. We have your statements. I will have a chance to look those over and see the contraindicatory positions that have been set forth here.

As I say, we don't need those who testified before. We have the principals in this final panel. I will see you then. We will let you know about the time. It will probably be about 9:30 on Tuesday, June 11.

Thank you very much.

[Whereupon, at 12:50 p.m., the subcommittee was recessed, to reconvene subject to the call of the Chair.]

TESTIMONY OF CHARLES K. BAXTER, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE SENATE SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION, CONCERNING SECTION 404 OF THE CLEAN WATER ACT.

May 21, 1985

Mr. Chairman, I appreciate the opportunity to appear before the Subcommittee today. My name is Charles K. Baxter. I am employed as a Fish and Wildlife Biologist for the U.S. Fish and Wildlife Service (Service) in Vicksburg, Mississippi. I supervise the Vicksburg Field Office of the Habitat Resources Program, and in that position, am responsible for the field level analysis, evaluation, and recommendations made on 404 permits. My geographic area of responsibility covers the core of the Lower Mississippi Valley (LMV), consisting of the entire State of Arkansas and approximately the western half of Mississippi and the northern half of Louisiana. I have spent nearly six years dealing with the application of the 404 permit program to the inland freshwater wetlands of the LMV.

During March 1983, my office issued a "Status Report on the Implementation of Section 404 in the Lower Mississippi Valley." I understand that a copy of this report has been forwarded to you. From January to July 1984, my office represented the Department of the Interior on the Panel for Bottomland Hardwoods which was convened and directed by the Assistant Secretary of the Army for Civil Works. Through both of these activities and our day-to-day interaction in the program at the field level, I have been involved in the basic issues associated with Section 404. These include the delineation of wetland boundaries and use of the 1982 MOA referral process.

The level of action and the response periods for Section 404 permits for my office are represented in the following statistical information which appears in the March 1983 Bottomlands Hardwoods Report and which has been updated to include data for the period from October 1, 1983 to April 30, 1985.

Responses on Permit Actions	No.	Percentage	Average Wetland Acres	Total Wetland Acres	Average Processing Time (Days)
No Action	86	13	58	4,990	15
No Objection	479	72	29	13,833	11
Modification	84	12	115	9,629	19
Denial	19	3	460	8,737	29
TOTAL	668	100		37,189	

During the approximately six years that I have been in Vicksburg, the Service has attempted to use the MOA elevation process five times. In each of these instances, the Service's recommendations for mitigation were not accepted by the Corps. The established timeframes for permit review were met by the Service during each of these situations.

Mr. Chairman, this concludes my prepared statement. I will be happy to answer any questions you may have.

TESTIMONY OF
ROBERT K. DAWSON
ACTING ASSISTANT SECRETARY
OF THE ARMY (CIVIL WORKS)

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

OF

THE COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS

WASHINGTON, D.C.
MAY 21, 1985

MR. CHAIRMAN, I AM ROBERT K. DAWSON, ACTING ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS. I APPRECIATE THIS OPPORTUNITY TO DISCUSS WITH YOU THE STATUS OF OUR REGULATORY REFORM PROGRAM TO IMPROVE THE EFFECTIVENESS OF SECTION 404 OF THE CLEAN WATER ACT (CWA).

THIS PROGRAM HAS BEEN VERY CONTROVERSIAL FROM MANY DIFFERENT PERSPECTIVES AND SOME VERY SERIOUS CHARGES HAVE BEEN MADE REGARDING ARMY'S STEWARDSHIP OF THE RESOURCES FOR WHICH WE ARE RESPONSIBLE.

MR. CHAIRMAN, I BELIEVE VERY STRONGLY THAT ADMINISTRATIVE CHANGES WE HAVE MADE TO DATE HAVE ALL BEEN IN THE INTERESTS OF GOOD, EFFICIENT GOVERNMENT AND HAVE NOT REDUCED THE ENVIRONMENTAL PROTECTIONS CONTAINED IN THE CLEAN WATER ACT (CWA), THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA), OR ANY OF THE OTHER ENVIRONMENTAL STATUTES WHICH APPLY TO THIS PROGRAM. WHAT WE HAVE DONE IS ELIMINATE OR REDUCE UNNECESSARY, DUPLICATIVE, AND WASTEFUL PROCEDURES. WE HAVE LEFT

THE SUBSTANCE OF THE PROGRAM INTACT AND HAVE ACTUALLY STRENGTHENED OUR ROLE IN ACCOMPLISHING THE GOALS OF THE CWA.

FIRST, I WOULD LIKE TO DISCUSS SOME BACKGROUND ON THE 404 PROGRAM, THEN A FEW AREAS OF CONCERN, AND I WILL CONCLUDE WITH UP-TO-DATE INFORMATION ON HOW REGULATORY REFORM AND THE 404 PROCESS IS WORKING.

I WISH TO BEGIN BY PUTTING REGULATORY REFORM IN HISTORICAL PERSPECTIVE. WE HAVE BEEN ACCUSED OF DISMANTLING THE PROGRAM. HOWEVER, AN EXAMINATION OF THE HISTORY AND DEVELOPMENT OF THE PROGRAM CLEARLY DEMONSTRATES JUST THE OPPOSITE. THE STATUTE WAS PASSED IN 1972. BETWEEN THEN AND 1975, VERY LITTLE CHANGE WAS MADE FROM THE PRE-1972 DAYS BECAUSE THE CORPS INTERPRETED ITS JURISDICTION TO BE LIMITED TO THE TRADITIONAL NAVIGABLE WATERS OF THE UNITED STATES. IN 1975, THE PROGRAM WAS EXPANDED BEYOND THE TRADITIONALLY NAVIGABLE WATERS UP TO THE HEADWATERS. IT IS IMPORTANT TO NOTE THAT AS OF 1975, THE PROGRAM DID NOT REACH ABOVE THE HEADWATERS OR INTO ISOLATED WATERS. REGULATIONS WERE REVISED IN 1977. AT THAT TIME, HEADWATERS AND ISOLATED WATERS WERE INCLUDED.

HOWEVER, A VERY BROAD NATIONWIDE PERMIT WAS ISSUED TO COVER ALL ACTIVITIES IN THOSE AREAS. THERE WAS ONLY A VERY LIMITED DISCRETIONARY AUTHORITY PROVIDED SO THAT VIRTUALLY NO ACTIVITIES ABOVE THE HEADWATERS AND IN ISOLATED WATERS RECEIVED INDIVIDUAL ATTENTION. THE ACT WAS AMENDED SUBSTANTIALLY IN 1977. IT EFFECTIVELY ENDORSED THE NATIONWIDE PERMIT PROGRAM.

AT THE NEXT REVISION OF THE REGULATIONS, 1982, NEW NATIONWIDE PERMITS WERE ISSUED, BUT MANY MORE CONTROLS AND CONDITIONS WERE IMPOSED ON ALL NATIONWIDE PERMITS AND THE DISCRETIONARY AUTHORITY WAS EXPANDED.

THE RESULT HAD DIFFERENT EFFECTS ON DIFFERENT TYPES OF PROJECTS. THE INTENSITY OF REGULATION FOR SIGNIFICANT ACTIONS WAS ACTUALLY INCREASED WHILE THE INTENSITY OF REGULATION FOR MINOR ACTIONS WAS REDUCED. THE NET RESULT WAS BETTER ADMINISTRATION OF THE PROGRAM BY GETTING CLOSER TO THE GOALS OF THE ACT WITHOUT INCREASING STAFFING AND FUNDING.

MANY PEOPLE MISUNDERSTOOD THE MANAGEMENT AND ADMINISTRATIVE MECHANISMS AT WORK AND A LAWSUIT RESULTED. THE FACT THAT THE LAWSUIT WAS SETTLED THROUGH A CONSENT AGREEMENT TESTIFIES TO THE

CONSTRUCTIVE HARD WORK OF PLAINTIFFS AND DEFENDANTS ALIKE. THE PROGRAM CONTINUES TO OPERATE IN AN IMPROVED FASHION IN ACCORDANCE WITH THE SETTLEMENT OF THE LAWSUIT.

HOWEVER, THERE REMAIN INEFFICIENCIES WHICH WE MUST ELIMINATE OR REDUCE IF WE ARE TO PROVIDE THE BEST POSSIBLE SERVICE TO THE PUBLIC WITH THE LEVELS OF STAFFING AND FUNDING AVAILABLE.

IN 1981, THIS ADMINISTRATION STEPPED INTO A SITUATION OF SOME CONFUSION AND EXTENSIVE UNNECESSARY, DUPLICATIVE RED TAPE. WE ESTABLISHED A DIRECTION FOR THE PROGRAM -- ONE OF RESPONSIBLE STEWARDSHIP FOR THE GOALS OF THE CWA WITHOUT ASSUMING AN OVERALL ARMY AUTHORITY FOR THE BROADER LAND-USE ISSUES THAT PROPERLY BELONG TO THE STATE AND LOCAL GOVERNMENTS. REGULATORY REFORM HAS ESTABLISHED THE ROLE OF THE ARMY AS ONE OF RESPONSIBLE AND ACCOUNTABLE LEADERSHIP. WE HAVE ACCEPTED THAT ROLE WITH ALL OF ITS PROBLEMS AND CRITICISMS. I BELIEVE WE HAVE MADE EXCELLENT PROGRESS IN STABILIZING AND ESTABLISHING A SOLID COURSE FOR A PROGRAM THAT WAS EXPERIENCING GROWING PAINS IN THE EARLY AND MID-1970'S.

WE BELIEVE THE PROGRAM IS ONE OF BALANCE AND WISE STEWARDSHIP. DECISIONS ARE OFTEN TOUGH AND EACH ONE IS DISPLEASING TO ONE SEGMENT OF THE PUBLIC OR ANOTHER. SOME MEMBERS OF CONGRESS HEAR ABOUT A SITUATION WHEN THE PUBLIC INTEREST BALANCE RESULTS IN ENVIRONMENTAL LOSS, EVEN THOUCH IN MANY INSTANCES THE PROJECT INCLUDES MITIGATION. OTHER MEMBERS OF THE CONGRESS HEAR ABOUT THOSE DECISIONS THAT RESULT IN LOST ECONOMIC OPPORTUNITY AND PREVENTION OF THE USE OF PRIVATE PROPERTY. I HEAR FROM BOTH SIDES, AND I BELIEVE THE PROGRAM IS WELL BALANCED.

AS FOR SPECIFIC CONCERNS, WE HAVE BEEN UNDER SHARP CRITICISM FROM MANY SOURCES. WE HAVE FOLLOWED UP WITH INVESTIGATIONS OF ALL SUBSTANTIVE CRITICISM AND HAVE FOUND THAT MOST OF THE CRITICISMS INVOLVE SPECULATIVE, UNSUBSTANTIATED CHARGES WHICH DO NOT AID IN A CONSTRUCTIVE ANALYSIS OF STRENGTHS AND WEAKNESSES OF REFORM EFFORTS.

MR. CHAIRMAN, IN RECENT STATEMENTS IN THE CONGRESSIONAL RECORD, YOU MENTIONED A DECEMBER 17, 1984, LETTER FROM THE FORMER ASSISTANT SECRETARY OF INTERIOR FOR FISH AND WILDLIFE AND PARKS, MR. C. RAY ARNETT. THE LETTER WAS HIGHLY CRITICAL OF OUR

IMPLEMENTATION OF THE MEMORANDUM OF AGREEMENT BETWEEN ARMY AND INTERIOR. YOU ALSO NOTED IN RECENT DISCUSSIONS A NOVEMBER 7, 1984, LETTER FROM MR. ARNETT WHICH WAS HIGHLY CRITICAL OF OUR GENERAL ADMINISTRATION OF THE 404 PROGRAM. HOWEVER, A POINT-BY-POINT ANALYSIS OF BOTH LETTERS SHOWS THAT THE VAST MAJORITY OF HIS CRITICISMS ARE NOT SUPPORTED BY FACTS.

FIRST, HE CONCLUDED THE MOA WAS NOT WORKING BECAUSE HE DISAGREED WITH THE DOCUMENTATION OF THREE DECISIONS OF THE CORPS OF ENGINEERS. IT SHOULD BE NOTED THAT NO ISSUE WAS RAISED CONCERNING THE SUBSTANCE OF THE DECISIONS. THE CORPS MAKES 11,000 SUCH DECISIONS ANNUALLY. I BELIEVE THAT DISAGREEMENT WITH THREE SUCH DECISIONS CANNOT BE EXTRAPOLATED TO SUPPORT THE SERIOUSNESS OF THE CHARGES MR. ARNETT MAKES. ADDITIONALLY, LOOKING AT THE SPECIFIC CASES RAISES QUESTIONS ABOUT THE SUBSTANCE OF DOI'S CONCERNS.

IN ONE CASE OF THE THREE CITED, SEASPORT, MAINE, THE DECISIONS OF TWO FEDERAL AGENCIES, THE CORPS AND THE DEPARTMENT OF TRANSPORTATION, WERE CHALLENGED IN COURT ON THE BASIS OF INADEQUATE ENVIRONMENTAL

DOCUMENTATION. THIS WAS THE SAME CHARGE DOI MADE. THE COURT RULED IN FAVOR OF BOTH THE CORPS OF ENGINEERS AND THE DEPARTMENT OF TRANSPORTATION, UPHOLDING THE ADEQUACY OF DOCUMENTATION. SO THE TWO RESPONSIBLE FEDERAL AGENCIES AND A FEDERAL DISTRICT COURT JUDGE ALL AGREE THAT THE DOCUMENTATION WAS SUFFICIENT.

IN ANOTHER CASE, A REFINERY IN GEORGETOWN, SOUTH CAROLINA, DOI REQUESTED A REVIEW OF THE DISTRICT ENGINEER'S DECISION NOT TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT. WE AGREED THAT THERE WERE REASONABLE GROUNDS FOR REVIEW. THE DIVISION ENGINEER THEN DETERMINED THAT AN EIS SHOULD BE PREPARED AND, BASED ON THAT ANALYSIS, THE PERMIT WAS DENIED. THE ACTION WENT EXACTLY AS DOI RECOMMENDED UNDER THE MOA, YET DOI RAISED THAT CASE AS AN EXAMPLE OF THE MOA NOT WORKING AND OF LACK OF SUFFICIENT DOCUMENTATION.

THE THIRD CASE, BUSH RIVER, VIRGINIA, WAS REVIEWED IN DETAIL BY EPA TO DETERMINE WHETHER TO EXERCISE ITS 404(C) VETO AUTHORITY. EPA CHOSE NOT TO VETO THE PERMIT.

WITH REGARD TO MR. ARNETT'S LETTER OF NOVEMBER 7, 1984, THE ALLEGATIONS ARE BASED ON WHAT WE BELIEVE IS ERRONEOUS INFORMATION. FOR EXAMPLE, MR. ARNETT CHARGED THAT THE CORPS HAD ALLOWED PERMITS TO BE ISSUED OVER OBJECTIONS OF THE FISH AND WILDLIFE SERVICE WHICH CAUSED THE LOSS OR DEGRADATION OF OVER 69,000 ACRES OF WETLANDS. WE EXAMINED THE SPECIFIED CASES AND FOUND THAT ONE PERMIT APPLICATION ACCOUNTED FOR 60,000 ACRES OF ALLEGED DEGRADATION (NOT LOSS) AND THAT PERMIT WAS ACTUALLY DENIED. HENCE, THAT ALLEGED DEGRADATION DID NOT AND WILL NOT OCCUR.

FOR AN ADDITIONAL 2,408 ACRES OF ALLEGED LOSSES, THE APPLICATIONS ARE STILL UNDER REVIEW AND NO PERMITS HAVE BEEN ISSUED. ANOTHER 4,331 ACRES WHERE PERMITS WERE ISSUED WERE CHALLENGED IN SEVERAL FEDERAL DISTRICT COURTS AND THE CORPS ACTION WAS FULLY UPHELD. THAT LEAVES 2,664 ACRES INVOLVING SIX CASES WHERE THE CORPS POSITIONS MAY BE CONSTRUED AS BEING AT ODDS WITH THOSE OF THE FISH AND WILDLIFE SERVICE. THAT IS TO SAY NOTHING OF THE NEED FOR THESE PERMITS AND THE TRADE-OFFS INVOLVED. ONE CASE WHICH ACCOUNTS FOR 27 ACRES OF LOSS AND 2,000 ACRES OF ALLEGED DEGRADATION IS TO PROVIDE MUCH NEEDED FLOOD PROTECTION TO THE CITIZENS OF CHESAPEAKE, VIRGINIA. I WOULD SUGGEST

THAT SIX CASES OUT OF A TOTAL 11,000 CASES IS QUITE A MINIMAL AMOUNT OF DISAGREEMENT, PARTICULARLY WHEN THE BENEFITS WHICH RESULT FROM THOSE ACTIONS ARE CONSIDERED.

WE SIMPLY CANNOT SUBSTANTIATE ANYWHERE NEAR THE EXTENT OF LOSSES CLAIMED BY OPPONENTS TO REGULATORY REFORM. WE HAVE MAINTAINED ALL NECESSARY ENVIRONMENTAL CONTROLS AND AT THE SAME TIME HAVE REDUCED SUBSTANTIALLY UNNECESSARY REGULATORY BURDENS ON THE PUBLIC. THE AVERAGE TIME TO EVALUATE A PERMIT APPLICATION AND REACH A DECISION OF WHETHER TO ISSUE OR DENY HAS BEEN REDUCED IN HALF, FROM ABOUT 140 DAYS IN 1981 TO ABOUT 70 DAYS CURRENTLY. THIS IS TRULY A SIGNIFICANT ACCOMPLISHMENT.

THIS IS NOT TO SAY THAT THE PROGRAM IS WITHOUT PROBLEMS. BECAUSE OF ITS NATURE, THE PROGRAM IS MANAGED AT THE FIELD LEVEL AND SOME INCONSISTENCIES OR "HORROR STORIES" MAY ARISE FROM TIME TO TIME. WE ARE ANXIOUS TO LEARN OF THOSE AND TO TAKE CORRECTIVE ACTION AS NECESSARY. BUT WE DO BELIEVE STRONGLY THAT THE OVERALL PROGRAM IS SOUND, EFFICIENT, AND EFFECTIVELY MEETS THE GOALS OF THE STATUTE.

PROBLEMS WITH JURISDICTION

THE MOST PERPLEXING DAY-TO-DAY PROBLEM THAT STILL FACES THE 404 PROGRAM IS THE LACK OF A SIMPLE DEFINITION OF PROGRAM JURISDICTION IN WETLANDS. THE CORPS DEFINED WETLANDS FOR THE PURPOSES OF 404 TO BE A SUBSET OF THE OVERALL WETLANDS DEFINED BY THE FISH AND WILDLIFE SERVICE. HOWEVER, THERE ARE THOSE WHO ARGUE THAT THE CORPS DEFINITION IS TOO NARROW. THIS ARGUMENT, IN ONE FORM OR ANOTHER, HAS PERSISTED SINCE THE 1972 FWPCA AMENDMENTS AND IS AS HEATED TODAY AS EVER.

THE CONGRESS HAS NEVER ADDRESSED THE ISSUE OF WETLANDS JURISDICTION; BUT IN ITS SILENCE, HAS LEFT THE MATTER TO THE COURTS TO RULE WITHOUT CONSISTENCY FROM REGION TO REGION. THESE ARGUMENTS THROUGHOUT THE COUNTRY WILL NOT BE SETTLED ADMINISTRATIVELY OR BY THE COURTS. INDEED, WE HAVE REQUESTED THE SUPREME COURT, AND THEY HAVE AGREED, TO REVIEW A CASE WHERE THE LOWER COURTS STRIPPED AWAY WHAT WE BELIEVED WAS SOME RATHER BASIC JURISDICTION. FURTHERMORE, FROM A PROGRAM MANAGEMENT STANDPOINT, THESE ARGUMENTS ARE SAPPING OUR ENERGY AND LIMITED RESOURCES AS WELL AS THOSE OF THE

OTHER INVOLVED AGENCIES AND THE COURTS. AGENCIES SPEND COPIOUS AMOUNTS OF TIME ARGUING IN THE FIELD AT EACH DISTRICT. THERE IS A NEED TO RESOLVE THOSE ARGUMENTS AND GET ON WITH THE BUSINESS OF OPERATING THE PROGRAM. WE BELIEVE THE ISSUE OF WETLAND JURISDICTION OF THE CWA DEMANDS APPROPRIATE LEGISLATIVE DIRECTION.

ONE SIGNIFICANT POINT TO RECALL IS THAT THE CONGRESS DID NOT DESIGN SECTION 404 TO BE A WETLAND PROTECTION MECHANISM AND IT DOES NOT FUNCTION WELL IN THAT CAPACITY. ACCORDING TO THE OFFICE OF TECHNOLOGY ASSESSMENT, THE VAST MAJORITY OF WETLAND LOSSES IN THE COUNTRY TODAY, 85 TO 90%, WOULD OCCUR REGARDLESS OF SECTION 404.

TRANSFER OF THE PROGRAM TO THE STATES

ANOTHER MAJOR POINT OF CONCERN IS THE ROLE OF THE STATES. IN 1977, CONGRESS AMENDED THE STATUTE TO ALLOW THE STATES TO TAKE OVER THE PROGRAM. IN ORDER TO SHOULDER ITS SHARE OF THE PROGRAM, THE CORPS INCREASED ITS STAFFING BY 300% AND FUNDING BY 500% SINCE 1975. THOSE INCREASES WERE TEMPERED BY AN EXPECTATION THAT A SIGNIFICANT PORTION OF THE PROGRAM

WOULD BE TRANSFERRED TO THE STATES. AS WE ALL KNOW, THAT DID NOT HAPPEN. ONLY RECENTLY HAS ONE STATE, MICHIGAN, TAKEN OVER SECTION 404 ADMINISTRATION. THE CORPS CONTINUES TO SHOULDER THE HEAVY WORKLOAD WHICH THE CONGRESS CLEARLY INTENDED FOR THE STATES TO CARRY. WE ARE CONTINUING TO WORK WITH EPA TO REVISE EPA'S REGULATIONS GOVERNING PROGRAM TRANSFERS.

ARMY AT THE BALANCE POINT OF EACH PERMIT DECISION

THE ARMY IS OFTEN ACCUSED BY THE REVIEW AGENCIES AS BEING ON AN "OPPOSITE SIDE" FROM THEM IN THE PERMIT REVIEW PROCESS. I WOULD LIKE TO PROVIDE YOU WITH OUR PERSPECTIVE WHICH I BELIEVE IS SUPPORTED BY THE RECORD OF THE ARMY'S POSITION IN THESE SITUATIONS. WHEN AN APPLICANT PROPOSES A PROJECT TO BE CONSTRUCTED IN THE WATERS OR WETLANDS UNDER FEDERAL JURISDICTION, WE WOULD EXPECT THE AGENCIES TO ADVISE THAT ONLY MINIMAL ENVIRONMENTAL IMPACTS SHOULD RESULT. WE RECOGNIZE THE RESPONSIBILITY THE REVIEW AGENCIES HAVE TO COMMENT ON THE QUALITY AND QUANTITY OF ENVIRONMENTAL RESOURCES AND THE ANTICIPATED IMPACT THE PERMIT ACTION MAY HAVE. ARMY'S RESPONSIBILITY IS TO CONSIDER THOSE COMMENTS AND THE PROPOSAL OF THE APPLICANT AND TO BALANCE THOSE INTERESTS IN THE MOST REASONABLE MANNER WITHIN THE

LAWS AND REGULATIONS. THE ARMY IS NOT ON THE OPPOSITE SIDE OF THE AGENCIES ANY MORE THAN WE ARE ON THE OPPOSITE SIDE OF THE APPLICANT. WE ARE AT THE BALANCE POINT -- SOMEWHERE BETWEEN THE TWO EXTREMES. AFTER THIS BALANCE OR COMPROMISE IS REACHED, THE AGENCIES THEN HAVE A MECHANISM, UNAVAILABLE TO THE APPLICANT, TO COMPROMISE AGAIN. AGENCIES LOOK FOR ARBITRATION BETWEEN THEIR VIEWS AND THOSE OF THE CORPS WHEN IN REALITY THE VIEWS OF THE ENTIRE PUBLIC, INCLUDING THE AGENCIES, HAVE ALREADY BEEN INCORPORATED IN THE CORPS VIEWS. THE RESULT OF THIS EXTRA PROCESS AVAILABLE TO THE AGENCIES IS A COMPROMISE ON A COMPROMISE, WITH ONLY ONE SIDE OF THE ISSUE PARTICIPATING IN THE SECOND COMPROMISE. THE APPLICANT IS LEFT OUT OF THE PROCESS.

ENFORCEMENT

WE BELIEVE THAT AN EFFECTIVE REGULATORY PROGRAM MUST HAVE EFFECTIVE ENFORCEMENT. REGULATORY REFORM HAS DONE MUCH TO REDUCE THE DELAYS AND UNCERTAINTIES OF THE 404 PROGRAM THROUGH THE EXPANSION OF GENERAL PERMITS AND IMPROVEMENT IN THE PERMIT PROCESSING TIME. THIS HAS HAD A POSITIVE EFFECT ON THE PUBLIC'S WILLINGNESS TO COMPLY VOLUNTARILY WITH THE LAW AND REGULATIONS AND HAS LESSENED THE NUMBER OF SMALL

VIOLATIONS THAT HAD BEEN COMMITTED EARLIER. OVER 4,000 ALLEGED VIOLATIONS ARE REPORTED TO THE CORPS DISTRICTS EACH YEAR. 28% OF THE VIOLATIONS INVOLVE ONLY SECTION 10, WHILE 72% ARE SECTION 10 OR SECTION 10/404 COMBINED. THE MAJORITY OF ALL VIOLATIONS (61%) INVOLVE PRIVATE INDIVIDUALS. TODAY, WE ARE APPLYING THE SPIRIT OF REGULATORY REFORM TO 404 ENFORCEMENT BY OUR EFFORTS TO DEFINE AND EXPLAIN THE NEED FOR PERMITS AND TO TAKE QUICK BUT REASONABLE ACTIONS TO ENFORCE THAT NEED AS WELL AS THE CONDITIONS OF ISSUED PERMITS. THIS APPROACH HAS ENABLED STAFF RESOURCES TO FOCUS ON THE MORE IMPORTANT ACTIONS.

NATIONWIDE GENERAL PERMIT #26

THE NATIONWIDE PERMIT FOR DISCHARGES UPSTREAM OF THE HEADWATERS AND INTO ISOLATED WATERS WAS MODIFIED AND REISSUED AT 33 CFR 330.5(A)(26) IN OUR OCTOBER 5, 1984, FINAL RULE. THIS FINAL RULE WAS PUBLISHED IN PARTIAL SETTLEMENT OF THE SUIT, NWF VS. MARSH. THIS NATIONWIDE PERMIT AUTHORIZES THE DISCHARGE OF DREDGED OR FILL MATERIAL INTO NON-TIDAL RIVERS, STREAMS, AND THEIR LAKES AND IMPOUNDMENTS, INCLUDING ADJACENT WETLANDS, THAT ARE LOCATED UPSTREAM OF THE HEADWATERS AND OTHER NON-TIDAL WATERS OF THE UNITED STATES, INCLUDING ADJACENT WETLANDS, THAT ARE NOT PART OF A SURFACE TRIBUTARY SYSTEM TO INTERSTATE WATERS OR NAVIGABLE WATERS OF THE UNITED STATES (I.E., ISOLATED WATERS OF THE UNITED STATES). THE APPLICABILITY OF THIS NATIONWIDE PERMIT HAS BEEN RESTRICTED IN THAT IT DOES NOT AUTHORIZE DISCHARGES WHICH WOULD CAUSE THE LOSS OR SUBSTANTIAL ADVERSE MODIFICATION OF TEN ACRES OR MORE OF WATERS OF THE UNITED STATES INCLUDING WETLANDS. FURTHERMORE, FOR DISCHARGES WHICH CAUSE THE LOSS OR SUBSTANTIAL ADVERSE MODIFICATION OF ONE TO TEN ACRES OF SUCH WATERS, INCLUDING WETLANDS, NOTIFICATION TO THE DISTRICT ENGINEER IS REQUIRED IN ACCORDANCE WITH 33 CFR 330.7.

NOTIFICATIONS PURSUANT TO NATIONWIDE PERMIT #26 MUST BE IN WRITING AND INCLUDE INFORMATION SUCH AS LOCATION AND DESCRIPTION OF THE PLANNED WORK. IF THE PLANNED WORK FALLS WITHIN A CLASS OF ACTIVITIES OR WILL OCCUR IN A CATEGORY OF WATERS WHICH HAVE BEEN PREVIOUSLY IDENTIFIED BY A STATE ON FEDERAL RESOURCE AGENCY AS BEING OF PARTICULAR INTEREST, OR THE DISTRICT ENGINEER BELIEVES THAT THE DISCHARGE MAY OTHERWISE BE OF IMPORTANCE TO THOSE AGENCIES, HE WILL AFFORD THEM AN OPPORTUNITY TO CONSIDER THE NOTIFICATION AND EXPRESS THEIR VIEWS. THE COORDINATION, EVALUATION AND DECISION REGARDING WHETHER THE ACTIVITY SHOULD BE WITHDRAWN FROM NATIONWIDE PERMIT AUTHORIZATION MUST BE ACCOMPLISHED WITHIN 20 DAYS.

TO DATE, THE CORPS OF ENGINEERS RECEIVED 68 NOTIFICATIONS UNDER THE PREDISCHARGE NOTIFICATION PROCEDURE. THE PROCEDURE RESULTED IN 11 PROJECTS REQUIRING INDIVIDUAL REVIEW. THE FEDERAL RESOURCE AGENCIES DID NOT OBJECT TO THE CORPS PROCESSING OF ANY OF THESE CASES.

PROCESSING STATISTICS

AS YOU HAD REQUESTED DURING YOUR HEARING IN 1982, I WILL CONFINE MY COMMENTS TO ONLY THOSE PROJECTS WHICH INVOLVE SECTION 404 OR SECTION 404 COMBINED WITH SECTION 10. THE CORPS OF ENGINEERS DURING FY 1984 ISSUED 5,859 INDIVIDUAL PERMITS AND DENIED 346. THIS MEANS THAT APPROXIMATELY ONE PERMIT WAS DENIED FOR EVERY 18 PERMITS THAT WERE ISSUED. (NOTE: FY 1983 - 6,760 ISSUED, 373 DENIED, 1 IN 19; FY 1982 - 8,864 ISSUED, 324 DENIED, 1 IN 28; FY 1981 - 8,350 ISSUED, 291 DENIED, 1 IN 30.) MOST ISSUED PERMITS CONTAINED MODIFICATIONS OR MITIGATION AS A RESULT OF THE CORPS EVALUATION. A CONSERVATIVE ESTIMATE WOULD BE THAT 50%

OF THE PROPOSALS ARE MODIFIED. MODIFICATIONS TYPICALLY RESULT IN A REDUCTION IN THE PROJECT SCOPE, A CHANGE IN LOCATION OR AN ALTERATION IN CONSTRUCTION METHODS. THE MOST FREQUENT REASONS FOR REQUIRING MODIFICATIONS INCLUDE THE LESSENING OF ENVIRONMENTAL IMPACTS OR IMPACTS ON HISTORIC PROPERTIES, AND IMPROVED ENGINEERING.

MITIGATION INCLUDED A VARIETY OF TYPES SUCH AS AVOIDANCE, REVEGETATION, COMPENSATION, IMPROVEMENT OF EXISTING RESOURCES, TIMING RESTRICTIONS ON CONSTRUCTION, AND STRUCTURAL APPURTENANCES SUCH AS INTAKE SCREENS AND ROADFILL CULVERTS.

DURING FY 1984, APPROXIMATELY 1,200 PERMITS WERE ISSUED FOR NON-WATER-DEPENDENT ACTIVITIES. THE TERM WATER DEPENDENCY HAS NOT BEEN CLEARLY DEFINED AND FOR THE MOST PART, SERVES LITTLE PURPOSE IN THE ANALYSIS OF AN APPLICATION UNDER SECTION 404. IT OFTEN CONFUSES THE ISSUES RATHER THAN PROMOTES AN OBJECTIVE ANLAYSIS. THE DETERMINATION AS TO WHETHER A BRIDGE OR A PIPELINE IS WATER DEPENDENT DOES NOT ALTER THE FACT THAT BRIDGES AND PIPELINES MUST IN MANY INSTANCES CROSS WATERS OF THE UNITED STATES. AS WITH NEPA, THE ALTERNATIVES ANALYSIS IS REALLY THE HEART OF OUR REVIEW UNDER 404. NEVERTHELESS, THE RATIONALE FOR

ISSUANCE OF PERMITS FOR NON-WATER-DEPENDENT ACTIVITIES GENERALLY RECOGNIZED THAT THERE WAS A LACK OF PRACTICABLE ALTERNATIVES OR THAT THE OTHER ALTERNATIVES WERE MORE ENVIRONMENTALLY DAMAGING. IN OTHER WORDS, THE PERMITTED ALTERNATIVE REPRESENTED THE LEAST ENVIRONMENTALLY DAMAGING, MOST PRACTICABLE ALTERNATIVE FOR THE PROJECT. EXAMPLES INCLUDED ACCESS FILLS AND DRILLING PADS FOR OIL AND GAS, BRIDGE CONSTRUCTION, LEVEES, RECREATIONAL HOUSING, AND ROAD AND PIPELINE CONSTRUCTION.

OF THE 346 PERMITS THAT WERE DENIED DURING FY 1984, MANY WERE DENIED FOR MORE THAN ONE REASON. A BREAKDOWN OF THE FACTORS IS AS FOLLOWS:

A. NON-COMPLIANCE WITH THE 404(B)(1) GUIDELINES	55
B. DENIAL OF STATE CERTIFICATIONS (401 OR CZM)	80
C. DENIAL OF OTHER PERMITS (E.G., STATE OR LOCAL)	21
D. OTHER PUBLIC INTEREST FACTORS	32
E. A COMBINATION OF TWO OR MORE FACTORS FROM A-D ABOVE	158

SUMMARY

I WOULD LIKE TO STRESS THAT THE BOTTOM LINE OF OUR REGULATORY REFORM IS THAT WE MAINTAIN THE ENVIRONMENTAL STANDARDS OF THE PROGRAM WHILE PROVIDING PERMIT APPLICANTS WITH FAIR, BALANCED, AND PROMPT RESPONSES TO THEIR APPLICATIONS.

WE HAVE MADE IMPROVEMENTS IN THE PROGRAM. THE PERMIT PROCESSING TIME AND BACKLOG HAVE BEEN REDUCED. THE 1982 MOA'S ARE WORKING EFFECTIVELY. THE OCTOBER 1984, FINAL REGULATIONS WERE PUBLISHED IN ACCORDANCE WITH THE SETTLEMENT REACHED IN NATIONAL WILDLIFE FEDERATION VS. MARSH. WE ARE NOT FORSAKING THE ENVIRONMENT OR TURNING THE DEVELOPERS LOOSE. OUR STATISTICS SHOW OUR DENIAL RATE IS HIGHER THAN BEFORE OUR REFORMS.

HOWEVER, DESPITE THESE IMPROVEMENTS, WE BELIEVE THERE IS STILL SUBSTANTIAL ROOM FOR ADDITIONAL ADMINISTRATIVE EFFICIENCIES TO REDUCE FURTHER UNNECESSARY BURDENS ON THE GOVERNMENT AND ON PERMIT APPLICANTS BY ELIMINATING DUPLICATIVE PROCEDURES, WASTEFUL ADMINISTRATIVE PRACTICES, AND NON-PRODUCTIVE

RED TAPE. ALSO, THERE IS STILL A NEED FOR CONGRESS TO PROVIDE SPECIFIC DIRECTION ON THE ISSUE OF WETLANDS JURISDICTION.

I BELIEVE THAT PART OF THE PROBLEM WITH MISCONCEPTIONS OF PROGRAM ADMINISTRATION IS THAT WE HAVE NOT PUBLICIZED THE GOOD NEWS. WE HAVE CHOSEN NOT TO ON THE BASIS THAT THE PUBLIC WOULD BE BETTER OFF IF WE CONCENTRATED OUR EFFORTS ON STRIVING TOWARDS THE GOALS OF THE CLEAN WATER ACT. HOWEVER, IT NOW APPEARS THAT THERE IS A SIGNIFICANT RISK THAT UNWISE PROGRAM CHANGES MAY BE PROPOSED BASED ON MISINFORMATION.

WE BELIEVE IT IS CRITICAL IN THE INTERESTS OF PROPER GOVERNMENT ADMINISTRATION THAT LEGISLATORS HAVE A COMPLETE PICTURE OF A PROGRAM AS THEY CONSIDER WHETHER ADJUSTMENTS ARE NEEDED. ACCORDINGLY, WE WILL BEGIN PUBLISHING PERIODIC REPORTS INCLUDING PROCESSING STATISTICS, DISCUSSION OF CURRENT ISSUES, RESULTS OF LITIGATION, AND FEEDBACK FROM THE INTERESTED PUBLIC.

SOME POSITIVE ACTIONS WHICH HAVE BEEN OVERLOOKED MAY SERVE AS A NUCLEUS OF THE FIRST SUCH REPORT. FOR EXAMPLE, AFTER YEARS OF DISCUSSIONS, WE RECENTLY REACHED AGREEMENT WITH EPA ON TWO MAJOR ISSUES

CONFRONTING THE PROGRAM. IN THE SETTLEMENT OF THE LAWSUIT, WE ADOPTED A PERMIT CONDITIONING POLICY DRAFTED LARGELY BY EPA STAFF AND, SEVERAL MONTHS AGO, EPA PUBLISHED GUIDANCE TO INTERPET AGRICULTURE EXEMPTIONS UNDER SECTION 404(F) WITH WHICH WE CONCUR.

ANOTHER GOOD EXAMPLE OF PROGRESS IS A BLUE RIBBON PANEL ESTABLISHED BY ARMY TO ASSESS POTENTIAL CUMULATIVE LOSSES OF BOTTOMLAND HARDWOOD FORESTS IN THE LOWER MISSISSIPPI VALLEY AREA. THE REPORT OF THAT PANEL IS BEING USED BY EPA AS PART OF ITS NATIONWIDE EVALUATION OF BOTTOMLAND HARDWOOD FORESTS. WE SUPPORT EPA'S EFFORTS AND LOOK FORWARD TO PARTICIPATION IN THE NATIONAL STUDY.

FURTHER, WE HAVE HAD CONSTRUCTIVE DISCUSSIONS WITH DEPARTMENT OF INTERIOR RECENTLY WHICH WE BELIEVE WILL LEAD TO A BETTER UNDERSTANDING OF THE POSITIVE STEPS WHICH ARE AVAILABLE TO RESOLVE INTERAGENCY DIFFERENCES.

IN RECENT MEETINGS WITH YOU AND YOUR STAFF QUESTIONS AROSE ON SEVERAL ASPECTS OF THE PROGRAM INCLUDING WATER DEPENDENCY, PRACTICABLE ALTERNATIVES, THE NATIONWIDE PERMIT FOR HEADWATERS AND ISOLATED

WATERS, AND ENFORCEMENT. I RESPONDED TO THOSE CONCERNS ON APRIL 8, 1985, AND HAVE INCLUDED MY LETTER WITH ITS ENCLOSURE AS PART OF THIS TESTIMONY.

THANK YOU MR. CHAIRMAN FOR THE OPPORTUNITY TO SPEAK BEFORE YOU ON THIS IMPORTANT MATTER. I AM PREPARED TO ANSWER ANY QUESTIONS YOU MAY HAVE.

STATEMENT OF
WILLIAM G. GORDON
ASSISTANT ADMINISTRATOR FOR FISHERIES
NATIONAL MARINE FISHERIES SERVICE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION
COMMITTEE ON GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

MAY 21, 1985

Mr. Chairman and Members of the Subcommittee:

I am William G. Gordon, Assistant Administrator for Fisheries, National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA). I appreciate the opportunity to appear before this Subcommittee to discuss NOAA's involvement with the U.S. Army Corps of Engineers (COE) regulatory program under Section 404 of the Clean Water Act.

NMFS provides an advisory or consulting function to Federal water resources construction and regulatory agencies under provisions of the Fish and Wildlife Coordination Act (FWCA). Under the advisory provisions of the FWCA, NMFS reviews and comments on Federal projects or Federally-authorized permits which propose to alter or develop the Nation's water resources.

We review exemption and license applications before the Federal Energy Regulatory Commission; Federal projects constructed and operated by the Corps and the Bureau of Reclamation, lease sales by the Minerals Management Service for oil and gas development on the Outer Continental Shelf; and Environmental Impact Statements for major Federal actions which significantly affect the quality of the human environment. This advice is given to allow other agencies to assess the potential effect of their actions on wildlife resources and their habitats. Where appropriate, we recommend alternative, less-damaging measures for development. We may also propose mitigation measures and, in some instances habitat restoration or enhancement activities. The NMFS Habitat Conservation Policy was published in November, 1983.

NMFS comments on projects requiring U.S. Army Corps of Engineers permits under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. In 1984, NMFS reviewed over 7,000 Corps of Engineers' permit applications for dredge and fill activities nationwide. Of these, no objection was raised to issuance of 6,100 (88 percent); modifications were recommended on 900 (12 percent) of the applications. Most reviews are completed in a timely fashion, i.e., during 1984, only 44 (0.6 percent) of

NMFS reviews were provided after the thirty-day review period. Also in 1984, NMFS requested that one permit case be forwarded to higher authority for resolution under provisions of the Section 404(q) Interagency Memorandum of Agreement (MOA). The case involved a proposal to impound 900 acres of wetlands in South Carolina. The Department of the Army denied our request to elevate this case. In this same period, 16 permits were issued over NMFS recommendations of denial but we did not seek referral under the MOA. There are now, and will continue to be, occasions when we must firmly oppose proposals to develop wetlands and other aquatic habitats.

The 7,000 permit applications that NMFS reviewed proposed over 14,000 acres of habitat alteration including 3,600 acres of dredging, 6,700 acres of filling, and 4,000 acres for impounding, draining, riprap, docks, piers, and other uses. NMFS recommended modifications, alternatives, and mitigation measures for 9,800 acres of proposed alteration of which 4,200 acres were proposed for filling. In 1985, we have distributed $50,000 to each of NMFS's five regions to prepare follow-up reports on the results of our recommendations to the Corps of Engineers. The reports are due in early 1986.

In 1984, NMFS recommended over 2,700 acres of mitigation to overcome losses attendant to permit issuance. Over 80 percent of this acreage was for restoration of habitat by means such as reopening isolated wetlands and open-water areas into nearby estuaries and the sea. A smaller amount was devoted to generating entirely new habitat through means such as converting dry land into subtidal or intertidal wetland. It is in the area of habitat restoration and creation where we hope to make the next important strides in fisheries habitat conservation.

In 1780 our Nation had an estimated 11 million acres of coastal wetlands. By 1954, the total had dropped to about 8.2 million and today approximately one-half of the original total remains. Losses were estimated to be about 10,300 acres per year between 1780 and 1954, but increased to almost 104,000 acres in years thereafter.

As a result of national recognition of the importance of wetlands, the overall rate of coastal wetland loss caused by development on non-water dependent projects has declined in recent years. There continue to be losses of coastal wetlands in parts of the United States from water-dependent projects, such as port and harbor expansion, petroleum exploration and production, and navigation and mooring facilities.

The importance of estuaries and their associated wetlands to marine fishery resources cannot be overemphasized. The majority of U.S. fish and shellfish species of commercial and recreational importance spend a critical part of their life in these areas. Such species are referred to as "estuarine dependent." Almost 70 percent of the U.S. harvest of commercial species have this characteristic. These include shrimp, salmon, menhaden, crabs, flounders, oysters and clams. Each year the commercial harvest of these and other marine species contributes about $12 billion to the U.S. economy.

Many marine recreational species are also estuarine dependent; examples are salmon, steelhead trout, striped bass, bluefish, and red drum. An estimated 18 million anglers enjoy marine recreational fishing and contribute another $8 billion annually to the U.S. economy.

Commercial and recreational fishermen are dependent on healthy fishery resources and their habitats. They also depend on adequate marinas, ports, navigation, and mooring facilities which may require removal of fishery habitats. The Nation is experiencing an evergrowing need for additional and alternative sources of energy and all communities, including coastal communities, are becoming more dependent economically on development projects of all kinds. As Federal managers, we are very much aware of the need to balance conservation of our natural resources against the need for coastal development.

Mr. Chairman, this concludes my prepared statement. I will be pleased to respond to any questions.

STATEMENT OF
JOSEPHINE S. COOPER
ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
May 21, 1985

Mr. Chairman and Members of the Committee, I am pleased to be here today to discuss EPA's activities to protect wetlands and other aquatic sites under Section 404 of the Clean Water Act.

EPA has assigned high priority to improved wetlands protection under Section 404, recognizing the vital importance of wetlands and the continuing rate of wetland loss. Although the 404 program is a small one within EPA, it is one through which significant environmental results can be achieved.

Because of the high priority we attach to this issue, we have been taking a number of steps to make EPA's 404 program stronger and more effective. We have consolidated EPA's program internally to provide for more efficient management. We have increased the levels of staffing and funding both in FY 85 and in our FY 86 budget request. We are moving to make a number of policy improvements which I will discuss below.

As the Committee knows, Section 404 is very complex. Although the Corps of Engineers (Corps) has principal operational responsibility as the permitting agency, EPA has important responsibilities as well. These include establishing environmental guidance for the national program under the (b)(1) Guidelines; approval and oversight of State 404 programs; review of proposed permitting actions; enforcement; and in effect an opportunity to veto proposed projects under Section 404(c). The Fish and Wildlife Service and the National Marine Fisheries Service in the National Oceanographic and Atmospheric Administration (NOAA) also have important commenting responsibilities. All this calls for an exceptional degree of interagency coordination if the legislation is to achieve its objectives with the least possible stress and confusion for the regulated community.

Despite these complexities, we believe that a more effective job in protecting wetlands can be done under the existing legislation, and we are working towards that end. I would like to discuss the various measures and initiatives EPA is taking towards more effective implementation of Section 404:

Clarification of elevation procedures The shared responsibilities under Section 404, differences in interpreting the (b)(1) Guidelines, scientific uncertainties, and difficult conflicts between individual property rights and community responsibilities for environmental protection mean that there have been and inevitably will be differences among agencies concerning permit issuance in specific cases. This makes it essential to have smoothly operating procedures through which EPA objection to the proposed issuance of a permit by a Corps District can be elevated for review at a higher level. The shape and nature of these elevation procedures is very important in providing EPA an opportunity for appropriate review where it has serious reason to disagree with a Corps District Engineer's decision.

The 1980 Memorandum of Agreement governing elevation procedures became an issue for review under the Vice President's Task Force on Regulatory Relief.

There were criticisms that the procedures were too cumbersome, too lengthy, provided too much opportunity for second guessing and created undue delay and confusion for applicants. This review culminated in a revision of the Memorandum of Agreement in 1982 to streamline the procedures. Army's memoranda with the Fish and Wildlife Service and NOAA were also revised along similar lines.

EPA strongly endorses the concept of improved and streamlined procedures and does not recommend a return to the first Memorandum of Agreement. We do believe, however that subsequent operating experience has suggested need for a number of improvements in the 1982 Memorandum. These improvements would provide improved wetlands protection, but would not create additional delay for the applicants. They would tend to minimize the stress which occurs when an applicant becomes caught between the conflicting views of two Federal agencies.

EPA has not made routine or frequent use of elevation, preferring to resolve issues at the field working level wherever possible. Since we have been operating under the 1982 agreement, among the many thousands of permits that we review annually, we have referred a total of 9 cases to Army for elevation. Of those, 5 elevation cases were denied, one was granted and resolved at a higher level to EPA's satisfaction, one was granted without resolution at a higher level, one was withdrawn because of resolution by EPA and the applicant subsequent to initiation of elevation, and one is pending. Although the number of elevated cases has been limited, it is of great importance to have available procedures which both are expeditious and provide adequate consideration of EPA views.

Therefore we have proposed to Army a number of adjustments to the existing Memorandum of Agreement. Former Administrator Ruckelshaus advised the Department of the Army on June 1, 1984 of the need to negotiate such changes.

We and Army have been negotiating since then but have not yet reached agreement, and the Memorandum lapsed as of December 1, 1984. However, we and the Army have agreed informally to operate in accordance with the provisions of the 1982 Memorandum until such time as we can resolve the outstanding issues. Basically, the changes we consider necessary would increase the opportunities for working out differences between EPA and Army at the field level. They would reduce the number of requirements for referral to Headquarters, with the attendant delays and problems involved in attempting to get resolution at that level. We plan to continue our discussions and hope that we soon will be able to come to a satisfactory resolution.

Section 404(c) The 404(c) provision provides an opportunity for EPA to, in effect, veto a proposed permit issuance by the Corps of Engineers under criteria specified in the Act. From the beginning of 1983 to the present, EPA has initiated six 404(c) actions. This is not a large number, but it does represent significant acceleration of activity, since 404(c) had only been used once prior to that time since its original enactment in 1972.

Of the 404(c) actions initiated since 1983 two have been completed by prohibiting or restricting the discharge of dredged or fill material; one was withdrawn and three are still pending. We believe that we are using this provision as Congress intended, and will continue to utilize it as necessary. We are also moving to streamline the regulations governing 404(c) to make its use less cumbersome administratively.

However, at the same time I wish to emphasize that the use of 404(c) as a veto is inherently a difficult problem. It is very time and resource consuming, for both the applicant and EPA. Further, the process can be very confusing to an applicant who has received clearances and approvals from one

Federal agency, only to be denied by another. It would be far better for the agencies concerned to work these issues out in a consistent way.

Advance Designation Going a step further, we believe that 404(c) could be a much more effective device to designate certain areas as unsuitable for dredged on fill material discharge when used in advance of permit requests.

We believe that there is a need to increase the predictability of the Federal response under Section 404. It is very important that we do a better job of informing the regulated community of what it is they can expect in terms of Federal wetlands protection actions. Therefore, we have been looking carefully at the potential of advanced designation of areas in which disposal of dredged and fill material would not be permitted, either under Section 230.80 of the (b)1 guidelines or Secton 404(c). This concept is based upon a recognition that some wetlands are more threatened, have higher societal values, or are rarer, and require an extra measure of protection. If we can make even a few of those determinations in advance, with the appropriate State and local participation and cooperation, we will do a much better job of forestalling or precluding confusion, delay and controversy in the regulated community. We would be dealing with the issue explicitly and up front. Similar concepts have been expressed in the Office of Technology Assessment's report, Wetlands Their Use and Regulation and the National Wildlife Federation's Corporate Conservation Council's wetland protection policy.

In the long run this prospect may offer the greatest potential for improving operations under the Act. Section 404 often involves extraordinarily difficult decisions. Advanced designation concepts cannot eliminate those inherent conflicts, but it could serve to address the issues in a much more direct fashion. However, advanced identification can also require much in the way of time and resources. We need to streamline our actions and work cooperatively with other Federal, State, and local agencies to the extent possible, if we are to expand our use of advanced identification.

We are in the initial stages of exploring that concept in a number of specific areas. For example, in Gray's Harbor, Washington and in the Port of Pascagoula, Mississippi, EPA has worked with the Corps, other Federal agencies, and State and local agencies in coastal management planning to ensure future development occurs in a manner that protects important coastal wetlands. On Chincoteague Island, Virginia, where local development interests have conflicted with enforcement of the Section 404 Program, EPA and the Corps are working in an advanced identification process to reconcile economic and environmental interests. On a broader scale, EPA's Chicago office is working with the States of Wisconsin and Illinois to ensure future projects along "environmental corridors" formed by important streams and adjacent wetlands are sited in a manner that minimizes adverse impacts on ecological values. While these efforts require a substantial investment of our staff time, we believe they are important to facilitate economic development which protects important environmental resources and the interests, such as commercial fishing, which depend upon them.

Wetlands priorities The fundamental nature of the 404 program is the review and evaluation of requests for permits to dispose of dredged or fill material in waters of the United States. As I have already indicated in my remarks on advanced designation, however, we do see opportunities for moving the program from a reactive to a proactive one, with benefits for environmental protection, more efficient and effective use of EPA's resources, and greater predictability for permit applicants.

In this regard, we think it is particularly important to give special attention, within our available resources, to high value wetlands which are threatened by or experiencing significant losses. In situations such as these, it is important to look at the entire ecosystem and the cumulative impacts of development, and to work torwards more consistent strategies for dealing with the problem.

One of the thrusts within EPA's programs overall is to put more emphasis on management for environmental results. This is encouraging us to seek ways to focus our efforts on specific geographic areas and to use the various tools and authorities available to EPA to deal with the environmental problems in those areas. This same concept applies to the Section 404 program. We have asked our Regions to attempt to focus their efforts by identifying those areas in which the discharge of dredged or fill material is a priority concern and to develop a more coherent program strategy for dealing with the problem in those areas, working with the other Federal agencies and the State and local interests concerned. An example is Chesapeake Bay, where we are making special efforts to address wetlands protection as part of the overall Bay clean-up program, along with such related efforts as non-point source control.

The bottomland hardwoods situation is an example of the need for a coherent strategy for preventing wetlands loss. Bottomland hardwoods, or river swamps as they are commonly referred to, provide very important wetland values in terms of fish and wildlife habitat, flood buffering, water quality protection, and recreation. The most extensive area of bottomland hardwoods is in the lower Mississippi Valley where there is an accelerated rate of bottomland hardwood loss through conversion to soybean agriculture. The 1984 report of the Corps of Engineers' Blue Ribbon Panel for Bottomland Hardwoods, on which EPA was represented, pointed out an average loss of 100,000 acres annually to soybean conversion. Therefore we have identified this as an area of priority concern to EPA.

A recent Federal court decision clarified that much of the bottomland hardwoods area is wetlands within the meaning of the Clean Water Act. The clearing activities raised in that case were also found to be subject to regulation under Section 404. We are very pleased that the Corps of Engineers has recently issued a Regulatory Guidance Letter clarifying for its Districts how these clearing activities should be regulated. We have also asked our Regions to formulate interim strategies for doing a more effective job, in their permit review and related responsibilities relating to bottomland hardwoods.

While we believe the effectiveness of EPA's program in bottomland hardwoods will improve after these strategies are complete, we are, of course, carrying out our program responsibilities as they are being developed. For example, our Atlanta office has recently taken two Section 404 enforcement actions in bottomland hardwoods. Our Dallas office has initiated a Section 404(c) action. This particular action may lead to prohibition or restriction of a discharge site affecting a 3700 acre tract of wetlands which includes large areas of bottomland hardwoods. Studies are now underway which will provide the scientific basis for our Region to determine whether or not to proceed with a recommendation to Headquarters to proceed with a Section 404(c) action.

To deal with the loss of bottomland hardwoods, particularly in the lower Mississippi Valley, we need an effective long-term wetlands protection strategy. With this in mind EPA has initiated a comprehensive study. We are now in the information gathering stage through a series of scientific workshops. This stage should be completed by the end of this year. We then expect to work closely with the other Federal agencies concerned to see what kind of a strategy might be adopted and feasible, recognizing the conflicting objectives of agricultural policy and wetlands protection. For example, we may be able to identify those areas of bottomland hardwoods that are of most value and require the highest level of protection.

Enforcement Effective enforcement is essential to assure compliance with all environmental laws, and the same is true of compliance with Section 404. Enforcement under section 404 is unique because of the co-administration of the program by the Corps of Engineers and EPA. As the permitting authority, the Corps has primary responsibility for assuring that permittees comply with conditions in Corps issued 404 permits. Where EPA discovers non-compliance with permit conditions, we believe this violation should be brought to the Corps' attention for action.

The bulk of EPA actions regarding 404 program enforcement should be directed towards discovery and remedy of unpermitted discharges. The Corps also has enforcement authority regarding unpermitted discharges, and so close coordination with the Corps is essential to assure that the agencies work together, that all Corps Districts understand our enforcement program, and that the appropriate District is informed of the course of action for each case EPA pursues.

EPA's enforcement program under 404 has not been a very active one in the past. However, as part of our effort to increase the effectiveness of 404, EPA is working to strengthen its enforcement program. For example, our Office of Enforcement and Compliance Monitoring is preparing a set of model 404 pleadings to help our Regional staffs become more familiar with such tools and enable us to increase national compliance levels without extensive increases in staff. The Office of Federal Activities is designing a 404 enforcement strategy guidebook which will not only define priority areas for EPA enforcement action, but also serve as a reference tool for policy, authorities and interagency responsibilities regarding 404 enforcement and compliance.

We are also discussing with the Department of the Army at Headquarters level the need for strengthened coordination mechanisms, generally to assure we have the necessary communication procedures and avoid confusion as EPA more effectively focuses its enforcement activities.

Hand in hand with more effective enforcement, is the need for better information to the regulated community to assure that they are fully aware of their compliance responsibilities. Many 404 issues deal with small land owners and it would not be fair to bring enforcement action on the one hand when the Federal government has not taken measures to advise them of those responsibilities on the other. This is particularly important, for example, in areas under the Corps' general permit for headwaters and isolated wetlands, where new requirements such as notification procedures, have been established as a basis for proceeding. We are working with Army to attempt to assure that the regulated community will be well-informed on these matters.

State Programs The Clean Water Act provides for assumption of portions of the Section 404 responsibilities by the States. Although we have worked diligently to encourage States to assume the program, our success has been limited. To date, only the State of Michigan has requested and received program assumption. Several other States are actively working toward program assumption.

There are several reasons behind this limited State interest. First, is the narrow jurisdiction that the States can assume under the existing law. Second, is the fact that there are no specific provisions for financial assistance, although States can use existing sources under Sections 106 and 205(g) of the Act. Finally, some States have considered the provisions of our existing regulations too inflexible in terms of requirements imposed upon the States.

We have been able to respond to this last concern by streamlining our regulations for program delegation to the States. Proposed regulations have been through the review period, we have received and analyzed public comments, and we expect to be able to go forward with the final regulations in the near future. This should enhance the opportunity for assumption of the program and we anticipate that several additional States will request and receive this authority. However because of the other limitations, we do not anticipate that a large number of States will seek authority for the program.

Despite that, there are substantial opportunities for working cooperatively with the States under their own authorities. About one half the States have laws which address some aspect of wetland protection. Basically, we think there is an important role for encouraging information exchange among existing State programs and for coordination between State and Federal authorities. We have been and will continue to increase our efforts to provide technical assistance and information support to those activities.

Inter-agency coordination I want to stress that, despite policy differences in some areas, we are working closely with the other Federal agencies. As I have indicated before, such coordination is essential to an effective Federal program. For example, in connection with EPA's Chesapeake Bay program, we are working with the Corps of Engineers on a series of initiatives to maximize our effectiveness. These include strengthened coordination with respect to enforcement compliance, EPA use of Corps of Engineers computerized tracking systems for permit information, joint funding of aerial imagery and wetland mapping; and collaboration in studying advanced identification under Section 230.80 of EPA's (b)1 Guidelines.

We are also about to enter into an interagency agreement with the Corps of Engineers on a cooperative wetlands training program for 404 field staff. We have an interagency agreement with Fish and Wildlife Service which provides EPA with scientific support for the 404 program. We are also working with Fish and Wildlife Service, the Corps, the Federal Highway Administration and 13 other Federal agencies to develop a methodology to assess the impacts of the discharge of dredged and fill material on wetlands. We believe these joint efforts will lead to an improved scientific foundation for wetland decisions and to more concensus among the agencies on complex scientific issues. EPA's Office of Research and Development is also planning to initiate work on the relationship between wetlands and water quality in support of the effort.

At the National level we are working with the Corps to develop scientifically consistent approaches for drawing wetlands boundary lines for jurisdictional purposes. We are also participating in a number of other interagency technical efforts related to wetlands identification. Efforts such as these will be continued and hold out the prospect for more effective implementation of 404 in the future.

Reflecting his commitment to wetlands protection and the need for a more effective strategy, Administrator Thomas has asked that we make a longer range assessment of the matter. He has asked that we look at how EPA can do a better job internally of conducting its programs which affect wetlands and how it can relate 404 actions to other priority EPA concerns such as nonpoint source controls, estuarine protection, and groundwater protection. He has also asked that we look at how we can relate our 404 activities to other wetland protection programs -- such as floodplain management activities of the Federal Emergency Management Agency (FEMA), the State Coastal Zone Management programs, the wetland acquisition programs of the Department of the Interior, and Interior's current study of Federal programs that provide incentives for draining and developing wetlands. We hope that the findings of this broad effort will also be of interest to this Committee as it continues to consider the issue of how wetlands can be best protected.

Mr. Chairman, I have reviewed the various actions EPA has underway to improve our effectiveness in providing environmental guidance for wetlands protection. I appreciate the opportunity to be here and stand ready to address any questions that the Committee may have.

TESTIMONY OF J. CRAIG POTTER, ACTING ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR, BEFORE THE SENATE SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION, CONCERNING SECTION 404 OF THE CLEAN WATER ACT.

MAY 21, 1985

Mr. Chairman, I welcome the opportunity to appear before the Subcommittee today to describe the role of the Fish and Wildlife Service (Service) in the implementation of Section 404 of the Clean Water Act (CWA). Section 404 authorizes the Army Corps of Engineers (Corps) to issue permits for the discharge of dredged or fill material into waters of the United States, including wetlands, at specific disposal sites. This section, which was revised in 1977, expanded a permit program that had been established previously under the Federal Water Pollution Control Act of 1972 and Section 10 of the 1899 Rivers and Harbors Act.

Section 404(q) of the CWA requires that the Corps establish an agreement with the Department of Interior (and other Federal agencies) in order to minimize duplication and delays in issuing dredge and fill permits resulting from agency comments on individual permit applications made to the Corps. Other provisions of Section 404 provide for Departmental involvement in the development of general permits. Within the Department of the Interior, these responsibilities have been delegated to the Service. Migratory waterfowl and fish are dependent on wetland habitat. Due to our trust responsibilities for these resources, implementation of Section 404 is of particular importance to us.

Since the purpose of this hearing is to discuss the involvement of several Federal agencies in commenting on individual applications for Corps permits, I will direct my remarks primarily to the role of the Service in this area. In 1967 an initial Memorandum of Understanding (MOU) was signed between the Departments of the Army and Interior to provide a framework for interagency consultation. This document was revised in 1980 and again in 1982. The 1982 document, a Memorandum of Agreement (MOA), responded to the goals of the Presidential Task Force on Regulatory Relief. The procedures contained in the MOA reduced the number of referral levels involved in the consultation process and limited review times for all of the involved Federal agencies. The intent of the 1982 MOA was to expedite the procedures involved in permit review without compromising the program's important environmental protections.

The 1982 MOA lists the mechanisms for interagency coordination, the general procedures to govern consultation, and the specific elevation procedures to allow review of a permit by a higher authority. We have been pleased to see that the amount of time necessary to arrive at a permit decision has been reduced since the completion of the 1982 MOA. However, we have recommended several changes to the MOA in an effort to more appropriately protect the environment without lengthening time frames provided by the existing agreement. A Departmental Task Force has been established to review the DOI/DOA MOA and to determine if there are any necessary adjustments to the Agreement. The Task Force has not yet completed its review.

A primary concern of the Service in implementing Section 404 is to mitigate resource losses, both individual and cumulative, by offering technical advice to the Corps. The Service views the development of mitigation measures during the planning process of Federally-licensed and permitted projects as critical to reducing impacts to fish and wildlife. In January of 1981, the Service issued its official mitigation policy in accordance with the authority granted by the 1956 Fish and Wildlife Act, the Fish and Wildlife Coordination Act, the Watershed Protection and Flood Prevention Act, and the National Environmental Policy Act. The basic policy of the Service is to "seek to mitigate losses of fish, wildlife, their habitats, and uses thereof, from land and water developments." The specific goal under this policy is to "conserve, protect, and enhance fish and wildlife and their habitats" and to "facilitate balanced development of this nation's natural resources by the timely and effective provision of fish and wildlife information and recommendations." In order to achieve this goal, the Service advocates the early provision of technical information to public and private agencies to enable decision-makers to minimize fish and wildlife losses as a part of initial project design. Four Resource Categories have been developed by the Service to guide the level of mitigation which the Service recommends for individual projects. The four categories are based on the value to fish and wildlife populations of the habitat to be impacted. The basic principle embodied in these resource categories is that the level of mitigation recommended will be commensurate with the fish and wildlife resource values at stake. Utilization of the concepts incorporated in the mitigation policy would ensure that the mitigation called for in the Corps 404(b)(1) compliance and public interest determinations appropriately compensates for the loss of public fish and wildlife resources.

We believe that the type and amount of mitigation should not be limited by applicant willingness or public interest determinations. Rather, mitigation requirements should be based upon sound biological principles embodied in accepted habitat evaluation procedures and should be guided by such decision concepts as those incorporated in the Service's mitigation policy. The mitigation requirements should not be limited by, but should complement and be a logical extension of, any determination of public interest.

In closing, I would like to stress our committment to designing and implementing an effective process for interagency consultation on Section 404 permits. I have emphasized the objectives of the Service's mitigation policy and the procedures whereby the Service attempts to incorporate appropriate mitigation measures during the early phases of a regulated project.

Mr. Chairman, this concludes my prepared statement. I will be happy to answer any questions which you may have, and to provide any background information on our involvement in the MOA procedures.

OVERSIGHT HEARINGS ON SECTION 404 OF THE CLEAN WATER ACT

MONDAY, JUNE 10, 1985

U.S. Senate,
Committee on Environment and Public Works,
Subcommittee on Environmental Pollution,
Washington, DC.

The subcommittee met at 10:38 a.m., in room SD-406, Dirksen Senate Office Building, Hon. John H. Chafee (chairman of the subcommittee) presiding.

Present: Senators Chafee, Stafford, Symms, Mitchell, and Lautenberg.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator Chafee. Good morning, everyone. I would like to welcome back to the panel this morning Mr. Potter from the Interior Department, Mr. Gordon from National Marine Fisheries, Ms. Cooper from EPA, and Mr. Dawson from the Army Department.

Three weeks ago we heard testimony from you and other witnesses on the status of the 404 dredge and fill program, what I would like to call the wetlands protection program. I must say I was less than enthusiastic about what I heard. In fact, I was upset.

First we heard from former Assistant Secretary of Interior Ray Arnett, describing his frustration with the Army in revising the memorandum of agreement, MOA. Mr. Arnett outlined some suggested changes which seemed to me to be modest and which would not result in extending the permit processing time, which people were concerned about. But as Mr. Arnett pointed out, he had been haggling with the Army for 2 years over these changes and his requests had fallen on deaf ears.

For me, the bottom line of Mr. Arnett's testimony was many of the environmental requirements spelled out in the Clean Water Act and other statutes are being ignored under the regulatory reforms imposed by the Army.

Next we had a panel which couldn't agree on anything, including the definition of a wetland, which is basic to the whole program. This panel came to tell us about the progress of the 404 program in the very valuable bottomland hardwoods area of Mississippi. Well, if I can read that panel, what was said, correctly, there doesn't seem to be any 404 program in the bottomland hardwoods. The corps has out-foxed the Fish and Wildlife Service and EPA.

EPA, who is ultimately supposed to determine wetlands, has rolled over and played dead, leaving it all up to the corps to make the decision. Certainly that was true in the Louisiana case. EPA had better wake up and realize that it has a joint responsibility with the corps in administering this program.

Then we heard the testimony of this panel. Because we ran out of time, you were good enough to come back to answer questions. We have reviewed your testimony so you do not have to repeat it. We will just have questions.

Before we begin with the questions, I would like to make a couple of observations. First, Mr. Dawson, in your opening statement, this is what you said: "One significant point to recall is that Congress did not design section 404 to be a wetland protection mechanism, and it does not function well in that capacity."

Well, I don't know who told you that, Mr. Dawson, but you ought to read the legislative history of the 1977 Clean Water Act amendments. You can start on page 644 of the Senate volume, which reads, and I quote to you, "There is no question that the systematic destruction of the Nation's wetlands is causing serious permanent ecological damage." The wetlands and bays and estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds of much of the fish and shellfish which populate the oceans. They are passageways for numerous upland fish. They are also nesting areas for a myriad of species of birds and wildlife. The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve.

Second, I am concerned that EPA—this is for you, Ms. Cooper—is not taking an aggressive role in determining wetlands. Although you, Ms. Cooper, mentioned in your testimony that EPA is beginning to delineate wetlands, EPA must take the lead in this issue and determine and identify wetlands and advance the cause so the corps knows ahead of time the waters it needs to have jurisdiction over.

I received a letter from the Missouri Department of Conservation, signed by Mr. Larry Gale, who is the Director, which states a number of problems they are having with the corps in administering the 404 program. The letter touches on a number of concerns which were raised at the last hearing. I will enter the letter into the record.

[The letter follows:]

MISSOURI DEPARTMENT OF CONSERVATION

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LARRY R. GALE, Director

May 30, 1985

The Honorable John H. Chafee
United States Senate
523 Senate Dirksen Office Bldg.
Washington, D.C. 20510

Dear Senator Chafee:

The International Association of Fish and Wildlife Agencies called our attention to your oversight hearings on Section 404 of the Clean Water Act. The Missouri Department of Conservation has sought to maintain aquatic and wetland habitat quality through the Corps of Engineers' Regulatory Functions Program for over nine years. Perhaps our experiences would be of interest.

The Corps of Engineers' Regulatory Functions Program in Missouri is administered by five District and four Division offices. Four of our Department professionals coordinate both Section 404 and civil works issues, plus maintain close working contact with the Environmental Protection Agency and the U. S. Fish and Wildlife Service. We also cooperate with the Missouri Department of Natural Resources, the State Clean Water and Section 401 authority. The close working relationship established between the reviewing agencies in Missouri has been largely responsible for those cases where wetland protection has been attained under Section 404.

In numerous instances where wetland protection has been less than desirable, a common denominator has been the Corps' inability to take jurisdiction over activities impacting wetlands and water quality. Frequently this inability stems from the definitions established by federal rule to guide the Corps' actions. Missouri's wetland resources are principally bottomland hardwoods adjacent to streams and rivers. Except for headwater streams, the Corps has taken jurisdiction over most activities involving dredge or fill in stream and river channels. The adjacent riparian wetlands have unfortunately not always met the Corps' wetland definition. We find it frustrating that this issue persists in Missouri in spite of the Avoyelles v. Alexander ruling in Louisiana.

A second jurisdictional problem concerns the definition of fill in wetlands. This issue involves the semantics of "fill" versus "waste"; the former is regulated under Corps interpretation, the latter is not. The impact on wetland values and the intent of Congress seems to have been ignored.

COMMISSION

JEFF CHURAN
Chillicothe

CARL DISALVO
St. Louis

JOHN B. MAHAFFEY
Springfield

RICHARD T. REED
East Prairie

Bottomland hardwood clearing that results in "waste" trees and other material placed in stream channels and "de-minimus" fill in wetlands is deleterious to water quality and the biological integrity of the nation's waters, regardless of definition. By using the correct terminology, a person can escape Corps' regulation, convert wetlands to other uses, and channelize streams.

The issue of stream channelization is of particular concern to us. We have documented the direct loss of 2,227 miles of stream channel to this activity with a corresponding loss of water quality and aquatic life. Although this activity is contrary to the goals of the Clean Water Act, we have had difficulty with the federal agencies taking jurisdiction because of the definitional problems described above. While the issue is argued, more miles of stream channel and adjacent wetlands have been lost and tons of sediment have degraded the nation's waters.

Our problems with Section 404 administration is not limited to definition restrictions. Missouri has 38,000 miles of headwater streams covered by a nationwide 404 permit. These streams are extraordinarily important to the aquatic health of receiving waters, yet requests for District Engineers to take discretionary authority over fill activities in headwaters have routinely been denied. We have been informed that discretionary authority would likely not be granted in any after-the-fact activity. This experience and state concerns for cumulative impacts to valuable headwater ecosystems lead to the recent denial of Section 401 certification of this nationwide permit.

The State of Missouri through the Department of Natural Resources elected to deny 15 nationwide permits during the Corps last rule-making effort. These denials are not permanent positions for 13 permits, but rather are aimed at securing regional conditions to assure wetland protection. The state will maintain denial for 330.5(a)(21) and (23), the nationwide permits covering surface mining and federally funded activities. This effort has been frustrated by differences between Corps Districts. The Corps has used, and threatens to continue to use, Paragraph 330.9 of their Rules to either force the Department of Natural Resources to either create a de facto permit program through the individual certification of nationwide permit requests or withdraw their denials. Congress provided a state option for assuming Section 404 regulation, but did not intend to penalize a state with program administration for denying unacceptable nationwide permits.

The Corps seems to place a high priority on speed in processing. Indeed, in a recent coordination meeting, a high level Corps official stated that the goals of the Act were being achieved because internal deadlines for granting permits were being met. Speed in processing should be a consideration, but the real priority should be protection of water quality. To date, the commenting agencies in Missouri have been working under a 21-day comment period with few problems on most before-the-fact applications. This is not the case in after-the-fact applications where our efforts center on restoration and/or mitigation to recover resource values. Corps enforcement on these matters has been lenient and issues have been allowed to become protracted. As the months and, in some cases, years drag by, wetland and channel losses become irrecoverable.

We do not suggest a radical fix for correcting these problems. Rather, clarification of goals, definitions and federal responsibilities could go a long way to resolve these matters. Since agencies charged with improving the Section 404 wetland definition have had problems doing so, the U. S. Fish and Wildlife Service expertise should be employed to both establish the definition and mediate wetland jurisdictional calls. We also recommend that any definition employed by the agencies critically and objectively consider impacts to wetland functions. The Section 404(b)(1) Guidelines are supposed to add this measure of objectivity, but in our estimation they fall short of the mark. The U. S. Fish and Wildlife Service and our Department have developed considerable expertise in objectively assessing wetland and aquatic habitat conditions. Since wildlife is considered an environmental barometer and is an important component of the biological aspect of water quality under the Act, perhaps this expertise could be brought to bear in determining wetland impacts.

Presently, some landowners choose to ignore the Corps' permit program and proceed with their activities. To date, the record with after-the-fact permits would seemingly support those actions. Fortunately, few elect to do so, but those that do seemingly create much environmental damage. This situation could be vastly improved by mandating swift due process for violators. The Corps alleges that the federal judicial system is to blame. Development of administrative law capability for the Regulatory Program may be a means for reversing the serious losses caused by protracted after-the-fact permit resolution. The Corps could greatly improve matters by increasing their surveillance and enforcement efforts, plus undertaking a program of informing and educating the public.

Finally, we frequently hear that "Section 404 is not a wetland protection measure." We concede that technically Section 404 reads as a dredge or fill regulation. However, the position that many state concerns are covered by Section 402 and thus subject to state administration appears to be bureaucratic buck passing. If the wetland definition issue could be resolved, many of these issues could clearly fall under Section 404. It has been presumed by many that Congress intended a wetland protection law in Section 404. Perhaps a clarification of that goal is in order.

In summary, we find that Section 404 is not providing full wetland protection in Missouri principally because of restrictive jurisdictional determinations and little to no resolution of after-the-fact violations. We trust this resume of our experiences and observation will be of value to your deliberations. The opportunity to share these concerns and suggested remedies for your consideration is appreciated.

Sincerely,

Larry R. Gale
LARRY R. GALE
DIRECTOR

cc: Mr. Jack H. Berryman
Executive Vice-President
International Association of
Fish and Wildlife Agencies

Senator John Danforth

Senator Thomas Eagleton

Senator **Chafee**. Now, finally, Mr. Potter, over the weekend there were articles in the New York Times and the Washington Post on the state of our national parks. This is from the Post: "Overuse and Development Cited as Threats to Parks—Group Calls for Restoration Plan."

You may remember, Mr. Potter, that you testified here last year on the wildlife and parks bill which I introduced. We wanted to offer an amendment to the appropriations bill of last year for a study of the threat to the parks. You remember the go-around we had with Ms. McLaughlin on that.

I didn't offer the amendment because Under Secretary McLaughlin told me that is the Department of the Interior were going to prepare a report internally on the issue. She said it would be ready by February-March of this year.

I wrote Ms. McLaughlin last March. Over 3 months ago, and asked for a status report on the study. I haven't received a response. Would you be good enough to look into that for me?

Mr. **Potter**. Yes.

Senator **Chafee**. Thank you. Now, we are delighted to have here the distinguished chairman of this full committee, who has certainly been a supporter of the environment in every respect. His knowledge and concern for the wetlands is not rivaled.

So. Mr. Chairman, we are delighted you are here. If you have a statement, we would certainly be glad to hear it.

OPENING STATEMENT OF HON. ROBERT T. STAFFORD, U.S. SENATOR FROM THE STATE OF VERMONT

Senator **Stafford**. Thank you, Mr. Chairman. I do have a statement.

I want to join you in welcoming the return of this morning's witnesses for a second day of hearings designed to examine how the section 404 Program of the Clean Water Act has been working.

Frankly, I am disappointed in how the program appears to be working, and I have come here this morning to express my concern and pledge my support for Senator Chafee's efforts to strengthen the program. I was unable to attend the initial section 404 hearing on May 21st, but testimony presented at that hearing and information generated by the committee staff has given me the opportunity to increase my concern in this matter.

It is disturbing to hear evidence of a trend over the last 4 years away from Federal regulation of dredge or fill material discharges into the Nation's waterways, particularly freshwater wetlands. It has been my hope that the Army Corps of Engineers had changed its old ways and decided to join in the national effort to protect our environment. Instead, there is a strong suggestion that the Corps of Engineers appears to be determined to take a very narrow interpretation of section 404 and the congressional mandate to protect wetlands. There are also strong suggestions that the Corps of Engineers is reluctant to change its view regarding section 404, despite court rulings, settlements, and the legitimate concerns of other Federal agencies.

I don't want to leave the impression that the Army Corps of Engineers is the only Federal agency that seems to have lost sight of the task of protecting our Nation's wetlands. Let me add quickly that there is enough evidence to suggest that EPA is, at the very least, timid in this regard as well. Let me try to be specific.

There is strong evidence that the Corps of Engineers remains unwilling to change its memorandum of agreement with EPA, the Fish and Wildlife Service, and the National Marine Fisheries Service, even though those agencies complain that the agreements limit their ability to adequately protect the environment.

Item: The corps appears to be dragging its heels in the regulation of the conversion of bottomland hardwoods and other similar wetlands in spite of the ruling of the fifth circuit in Avoyelles and the corps commitment in its settlement of the *National Wildlife Federation* v. *Marsh* lawsuit.

The Army Corps also appears to be thwarting implementation of the changes in its nationwide general permit for the categories of waters agreed to in the settlement of the *National Wildlife Federation* v. *Marsh* case. EPA and the corps have still not agreed to a definition on fill material, after 5 years of dispute and after agreeing in the National Wildlife Federation versus Marsh settlement to arrive at a common definition by May 1984.

Item: Illegal discharges continue because the Corps of Engineers apparently has little interest in enforcing the requirements of section 404 in this regard. At the same time, the EPA seems to be allowing the corps to exclude from section 404 coverage hundreds of thousands of acres of valuable swamps and bogs that are undeniably waters of the United States. I hope the witnesses at today's hearings will respond substantively to these complaints during their testimony.

My concern over this issue has been increased considerably by the testimony at the May 21st hearing that was given by Robert Dawson, the Acting Assistant Secretary of the Army for Civil Works, the civilian arm of the Corps of Engineers. I know Mr. Dawson disagrees, but as one Member of the Congress who has had more than a passing interest in the Clean Water Act of 1972 and 1977, I can assure Mr. Dawson that it was the intent of the Congress that wetlands are important and are to be protected under section 404 of the Clean Water Act. For an agency as important to this task as the civilian arm of the Army Corps of Engineers to hold otherwise is to frustrate the very goals of the act.

I also want to say, again in disagreement with Mr. Dawson, that it is the opinion of this Senator that the water dependency task is the keystone to the goal of preventing unnecessary destruction of wetlands. It serves an important purpose in the analysis of section 404 permit applications. It is my view, for instance, that we should not be making it easier to fill wetlands for clearly nonwater-dependent purposes, such as construction of shopping malls.

It is not easy for me to come here to differ sharply with Lee Thomas of EPA or Bob Dawson of the corps, whom I hold in high regard. I think each is a fine public official. But it has come to my attention that my absence from an earlier hearing on this issue has been determined in some quarters as a lack of interest and that Senator Chafee and I are not in common agreement on this section 404.

I want to make it clear that my good friend, John Chafee, and I are in full agreement on this issue. I want to say how pleased I am that he has provided this additional opportunity to explore these issues and to get at the heart of our problems with section 404. Senator Chafee, as usual, has provided extraordinary leadership on behalf of an effective wetlands protection effort under section 404, and I come here today to thank him for that and to support his efforts.

Thank you, Mr. Chairman.

Senator CHAFEE. Thank you very much, Mr. Chairman. I appreciate that. I didn't know anybody was reading into it that there was some difference. That is one I hadn't heard. But if anybody wants to suggest that, I think you have certainly put any such suggestions to rest, Mr. Chairman.

Going in the order of appearance, Senator Lautenberg.

Senator LAUTENBERG. Mr. Chairman, thank you.

Senator CHAFEE. We are delighted you are here. Also, I want to say that I think everybody has made a very special effort to be here on a Monday morning. I know that some have come a distance. I particularly want to commend Senator Mitchell, who I understand got up at 5:30 to come back from Maine and cancelled some appointment he had in Maine to come to these hearings. That is indicative of his concern.

Senator SYMMS. Mr. Chairman, I might just point out I came from the great potato state to be here this morning.

Senator CHAFEE. Good. We are delighted. All I did was come from McLean, so you folks have outdone me.

Senator Lautenberg?

OPENING STATEMENT OF HON. FRANK R. LAUTENBERG, U.S. SENATOR FROM THE STATE OF NEW JERSEY

Senator LAUTENBERG. Based on the time it took me to fly, I could have come from a lot further distance than New Jersey, too, Mr. Chairman. We ought to hold hearings on the airways.

I do commend you for holding these hearings on the implementation of the 404 process under the Clean Water Act. At stake is the integrity of the procedures established by Congress to balance economic development and the protection of our vital natural resources. I know that the focus this morning is largely on wetlands and the permitting process there, but a matter of particular concern to me, which demonstrates the weakness in the 404 process, is one that includes Westway in New York City.

As you know, Westway is a proposed highway and development project which will require filling in over 200 acres of the Hudson River. Recently the Corps of Engineers issued a permit for this project, despite historic opposition from agencies charged with reviewing permit decisions under section 404. The decision is now under review by a Federal district court in New York. It has also been challenged in the Congress, where legislation to prohibit the land filling of the Hudson River has been introduced in both the House and Senate. I have cosponsored one of those bills, Senator Proxmire's bill, S. 826, to this end.

Mr. Chairman, Westway is of interest to the committee this morning for several reasons. First, a review of the draft and final environmental impact statements on this project reveals significant differences. The draft EIS on Westway found the impact of the project on the striped bass habitat in the Hudson River would be, and I quote, "significant and adverse."

Under the Clean Water Act, this is a finding which should result in a denial of the permit. In the final EIS on Westway, this finding was eliminated. No satisfactory explanation has been offered to account for these differences.

Second, the Federal agencies with responsibilities under section 404 have, as I said, historically opposed this project. Their regional officers recommended that the project not go forward. Yet, after years of study, in a matter of days their recommendations were summarily reversed in Washington. To my mind, there has not yet been a satisfactory explanation.

Finally, Mr. Chairman, there is evidence of some intervention in the permitting decision on Westway. I must acknowledge an additional concern about Westway. Last July the draft EIS on Westway suggested that New Jersey restrict development of its shorefront to mitigate some of the adverse environmental impacts of the project. I did not consider this an effective mitigation measure. Nor do I consider it fair to ask one State to limit its economic growth, to shoulder the burdens of a project in another State.

In the course of the past year, I have submitted comments to the corps, met with Colonel Griffith of the corps' district office, and Chris Daggets, Administrator of EPA's regional office. I have expressed my concern about the striped bass habitat and sought assurances that a go-ahead on Westway would not pose a threat to New Jersey's environment or future economic development along the river. Neither the corps nor EPA could give me these assurances. Ultimately I appealed to EPA Administrator Lee Thomas to either veto Westway's permit or insist on further environmental review by the CEQ.

Review of the Westway project through the 404 process has been vitally important. It has highlighted significant problems with the project which, unfortunately, have been ignored. The first time this happened, the Federal judge enjoined the corps from issuing the permit for Westway. A hearing on the newly proposed permit for Westway is now under way. Should the court lift its injunction on the corps issuing the permit, I suspect action in the Congress to stop this project.

Westway is a prime example of a problem to be explored in these hearings. In that context, I intend to pursue some of the troubling developments surrounding Westway's permitting process with our witnesses today.

Thank you very much, Mr. Chairman.

Senator CHAFEE. Thank you very much, Senator.

We are delighted that the ranking member of this subcommittee is here. Senator Mitchell has been deeply active in this area for many years, and his concern over the preservation of the wetlands is well known. We welcome you after your trip and appreciate your coming and making the effort.

I must say to those in the audience, I don't think you will find any other committee room that has five Senators in attendance at this time on a Monday morning, certainly today. So this shows the interest that these members have in the matter we are considering today.

Thank you, Senator Mitchell.

OPENING STATEMENT OF HON. GEORGE J. MITCHELL, U.S. SENATOR FROM THE STATE OF MAINE

Senator **Mitchell**. I thank you, Mr. Chairman. I have a brief statement I would like to make. Before I do, I would like to note for the record that Senator Moynihan is appearing this morning at a hearing of the Joint Economic Committee in New York City and is therefore unable to attend this hearing on section 404. He will, however, submit questions for the record.

Mr. Chairman, I join the other members and you in welcoming the witnesses to today's hearing on section 404. I hope that this hearing will contribute to more effective administration of the 404 program and the increased protection of one of our Nation's important resources, wetlands.

Section 404 of the Clean Water Act provides a program for permitting the disposal of dredge or fill material around or in our Nation's waters. Administered by the Army Corps of Engineers, this section of the act was intended by Congress to be one of the most important regulatory tools to stem the loss of wetlands. Unfortunately, it has not done so.

Few Americans would disagree that wetlands are of national importance. Waterfowl and other water birds are dependent on wetlands throughout their life cycles, as are many fur-bearing animals. It is estimated nearly two-thirds of the fish caught by American commercial fishermen are dependent on estuarine areas and associated wetlands. These areas also buffer the effects of storms, purify water, aid in ground water recharge, and provide substantial flood control.

The State of Maine, which I represent, benefits enormously from its wetlands. Fish and wildlife nurtured by wetlands provide recreational hunting, fishing, and trapping opportunities to nearly 40,000 people in our State. These activities contribute nearly $120 million annually to Maine's economy. More than $7 million is received from fishing and hunting licenses alone.

Wetlands are also vital to the commercial fish and shellfish industry in Maine. Wetland tidal flats represent 48 percent of the intertidal habitats of Maine. Fisheries of the tidal flats rely heavily on the organic material from the salt marsh habitats and riverines. As a result, many of Maine's commercial fish species are dependent on wetlands for various stages of their life cycles.

The commercial fish harvest in Maine has totaled over 200 million pounds of fish and shellfish. That is over $100 million. That is one State.

The controversy surrounding the section 404 program has increased dramatically in recent years. The Fish and Wildlife Service, Environmental Protection Agency, and conservation groups have contended that the program is not adequately protecting wetlands because of regulatory changes implemented by the corps and unworkable memoranda of agreement between the corps and these agencies.

I must say the evidence adduced at these hearings so far tends to support those contentions. This hearing is an important step in identifying problems with implementation of the 404 program, two of which particularly concern me: the protection of isolated wetlands and the definition, or lack of definition, of what constitutes fill material, to which Senator Stafford alluded in his opening remarks.

I look forward to the answers by today's witnesses to the many questions which I and other members of the committee will have. I hope out of all this will come a renewed commitment and action towards protecting our Nation's wet wetlands. Thank you, Mr. Chairman.

Senator CHAFEE. Thank you very much, Senator Mitchell.

Senator Symms, we welcome you after your long trip. I know of your interest in these matters. We look forward to your statement.

OPENING STATEMENT OF HON. STEVE SYMMS, U.S. SENATOR FROM THE STATE OF IDAHO

Senator SYMMS. Thank you very much, Mr. Chairman. My statement will be very brief.

I first just want to say to the chairman of our committee that certainly this Senator never interpreted a lack of dedication to this cause from his absence. We certainly do respect your interest and concern in this.

I guess I am one member here that has felt that the corps has paid some attention to the necessity for water to be used for development, for mining, for agriculture, and other uses that people have to have. I think that they have been very sensitive to those issues which are particularly critical and important with respect to the allocation of western water in some of the States where we are constantly short of water for necessary development. I do appreciate their sensitivity to some of those issues.

I think there are two sides to this argument. I do believe that wetlands are valuable, they are important, and I would not take anything away from any of the other members for their positions on this because it is of vital importance to us. Many of us in the west support private efforts through Ducks Unlimited, for example, to help develop wetlands, but we also have a problem in States like Wyoming, Montana, Idaho, and other arid States, where water is so scarce that we have to recognize the needs of the people that are involved. I think that is where some of the controversy evolves.

I have some questions I would like to ask, Mr. Chairman, as the morning goes on. I am required to be at another meeting for a brief time in my senior Senator's office shortly after 11, but I will be back with the few questions that I have as soon as possible.

Senator CHAFEE. Fine. There will be opportunity for that. My proposal is that we limit the questions. We will go in order of appearance and we will limit the questions to around 8 minutes and then we will come back. Everybody will have their chance, because we want to cover this subject thoroughly.

Now, Mr. Potter, you and Mr. Arnett indicated in your testimony that you have been trying to renegotiate this MOA with the corps on 404. Could you bring us up to date on where you stand and what seems to be the attitude of the corps? Are you getting anywhere? Are they stonewalling you? Where is this going to end up?

Frankly, I want to see this MOA renegotiated. Mr. Arnett clearly indicated that. You indicated that as well. So where do we stand? You might state briefly your concerns with the present arrangement.

Mr. POTTER. Initially, Mr. Chairman, we took an approach where we worked directly with the corps on the MOA. That has been ongoing for some time, as you know. There has been a good deal of exchange of information and there has also been within the permit process expression of concern.

We have within the Department also undertaken a 404 review to bring into the process all of the agencies in Interior that have any concerns or awareness of the 404 situation. The idea behind that was to try to consolidate a departmental position as opposed to a position of the Fish and Wildlife Service or the Assistant Secretary and, if necessary, deal with the problem at the Cabinet council level.

Within the context of the MOA itself, the best thing for me to do would be to summarize the concerns that we have. The basic problem that we have is a need for a resource related orientation in the MOA. It is unclear within the context of the MOA exactly how resource values are to be considered, wetland values in particular.

The criteria for elevation in the MOA are overriding matters of national significance—I am paraphrasing—whether or not there is significant new information, and whether or not there has been a failure to have interagency coordination.

We feel that within the criterion dealing with issues of national importance—we clearly have an indication from courts and others, certainly our resource people—that wetlands are to be considered here. Since there is no criterion for elevation based on the environment, however, we are not eaxactly sure how wetlands fit into the elevation process. The corps knows this. We have discussed this with them.

There are four other specific points. We are concerned about the fact that we have no opportunity to negotiate with the district engineer after he has our comments but before he has decided to issue the permit. We feel that if we had this opportunity, we could negotiate and possibly resolve some of these permit problems. That is the second point.

The third point is that there is a requirement in the MOA that the Regional Director of the Fish and Wildlife Service must threaten to elevate in order to elevate. We have some expressions of concerns that we have received from applicants as a result of this because they were forced into a contentious situation perhaps too early in the process. We also have some indication that in some cases they may not do as close an analysis on permits that we are not planning to elevate, and we have some concerns there.

Senator CHAFEE. The complaint of the Army, at least from the testimony last time, was all of this is going to take too long. The key thing here is to rush, rush, rush. That was what was indicated from the task force of the Vice President.

What you are raising here today are exactly the points Mr. Arnett raised, aren't they?

Mr. POTTER. They are.

Senator CHAFEE. No one will ever accuse Mr. Arnett of being overboard in pandering to the environmentalists. I think, Senator Symms, you can speak to Mr. Arnett's qualifications. You know him well. And he caught a balance, if that is the key word, in this business. But he was deeply disturbed, and I don't know, Senator, if you had a chance to see what Mr. Arnett had in his testimony, he was deeply concerned over the failure of this MOA to be renegotiated with the Army.

But in any event, can you do all of these things within the time limits that the corps is seeking?

Mr. POTTER. We have difficulty with some of the time limits, but I think we have done well in terms of trying to comply with them. The real question I think deals with those permits that are not actually subjected to a good deal of discussion and scrutiny and the losses related thereto, wetland losses. We just do not know, except in very gross terms, what is happening in some of those areas. Because we are trying to speed this process up, we feel, as a concomitant aspect of the whole business that we should understand better the implications of the process for wetland losses.

Senator CHAFEE. Are you getting anywhere, with the corps?

Mr. POTTER. We are doing a lot of work ourselves.

Senator CHAFEE. How can you do work yourselves and renegotiate an agreement? Don't you have to talk to the corps?

Mr. POTTER. We do. We do not get enough followup, I think, in many cases. There are a couple of reports outstanding that have required some followup. There is a New Jersey report that has been discussed to some extent where we sat down with EPA and we expected some enforcement actions following disclosures of some problems. I do not know where that situation stands.

Senator CHAFEE. I only have 30 seconds. This has been going on for how many years?

Mr. POTTER. It has been going on here for 4½ years now, since 1980.

Senator CHAFEE. At what point do you get exasperated?

Mr. POTTER. That is difficult to say, Mr. Chairman. I think it has been a frustrating process for all of us.

Senator CHAFEE. What was the date of Mr. Arnett's letter to Mr. Dawson?

Mr. POTTER. November 7, I believe.

Senator CHAFEE. Of what?

Mr. POTTER. Of 1984.

Senator CHAFEE. In that letter, he expressed his frustration.

Mr. POTTER. Yes, he did.

Senator CHAFEE. Well, my time is up, but you people are the world's most patient people. It seems to me if you want a memorandum of agreement renegotiated, I don't want to put words in your mouth, but it seems that the corps just is stonewalling you. Is that right or wrong?

Mr. Potter. Well, we are presently negotiating, continuing to negotiate, some aspects of the threat of elevation situation. We keep going back over these problems. We have not resolved them to our satisfaction.

Mr. Dawson. Mr. Chairman? If I might, I think it is important, in fairness, on the points you have just made, we have five differences, as Mr. Potter has outlined. I believe we and his staff and my staff would both agree that in four of those five we have agreed in principle. I think we are making some headway. I think we do have an opportunity to resolve this. And I think Mr. Potter would agree with that.

Senator **Chafee.** I guess my question to you is, then, Mr. Dawson, when do you think this is going to be resolved?

Mr. Dawson. Well, Mr. Chairman——

Senator **Chafee.** I have to keep the time here, so I am over my time, but in 10 seconds or less.

Mr. Dawson. Sir, I don't know if I can answer it in 10 seconds.

Senator **Chafee.** I am not cutting you off. I will get back to you. Just in fairness to the others. I am going to keep them to a strict time and I have to keep myself to it. I will get back to you in the repeat round.

Senator Stafford?

Senator **Stafford.** Thank you, Mr. Chairman.

Mr. Dawson, in your testimony you stress that when the corps makes a decision to issue a permit, it balances the interests of the Fish and Wildlife Service and the Environmental Protection Agency against those of the applicants in order to compromise the differences in viewpoint. My understanding of the law is that you are required to apply EPA's 404(b)(1) guidelines and make your threshold permit decision on the basis of those guidelines. Will you explain how you apply the 404(b)(1) guidelines and where the balancing decision fits in?

Mr. Dawson. I certainly will, Mr. Chairman, and I appreciate the opportunity to do that. If I might take just a moment, Senator Chafee, quite rightly, had asked us not to prepare an opening statement since we had done that before. There were a number of statements made in the opening comments that are of great concern to me, and I hope and trust that in the course of our discussions today we will have a chance to address them because we do believe the program is working. We think we are doing a good job. Not perfect. We are open to changes. We don't think the MOA's are unworkable.

But going back to your specific question, you very correctly state that the 404(b)(1) guidelines are a mandatory application, that the corps must do, and the balancing process must assume that that threshold has been met. I think as a practical matter the balancing begins from the moment an application is filed, and clear lines are not drawn as to when the 404(b)(1) guideline analysis starts and stops and the balancing starts and stops.

But the fact is that you are absolutely correct, that the (b)(1) guidelines must be applied notwithstanding any other balancing process.

Senator **Stafford**. Mr. Dawson, I understand that the Wilmington decision sometimes refers to a "non-404 wetland." Could you tell us what a non-404 wetland is?

Mr. **Dawson**. I am not familiar with the Wilmington decision which you mentioned, Senator.

Senator **Stafford**. In that event, why don't you answer that for the record.

Mr. **Dawson**. I would be glad to. Thank you, sir.

[The information requested follows:]

The reference to "non-404 wetlands" is derived from the difference in the Fish and Wildlife Service use of the term wetlands in their National Wetlands Inventory, and the definition of wetlands as found in the Corps and EPA regulations.

The Army and EPA, following the *NRDC* v. *Callaway* decision in 1975, developed a definition for "waters of the United States" that includes those wetlands that are "inundated or saturated by surface or ground water at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." This definition was incorporated in the Code of Federal Regulations as the Federal definition of wetlands as pertains to the Clean Water Act. It calls for the presence of three parameters—inundation or saturation by water, wetland vegetation, and saturated or hydric soils—before an area is identified as a wetland.

The National Wetlands Inventory established a system which accounts for every conceivable area of water and land which is affected by water, contains hydric soils, or is dominated by one or more plants from a published list of nearly 3000 species. A positive determination of the presence in an area of one or more of those parameters—water, hydric soils, of listed plants—will result in its classification as a wetland under the National Wetlands Inventory. The Fish and Wildlife Service acknowledges, in a special note on their National Wetlands Inventory maps, that agencies with jurisdiction over wetlands may define or describe them in a different manner than is used in the Inventory, and that the NWI is not an attempt to define the jurisdiction of those agencies.

Our Wilmington District identified an example of a "non-404 wetland" based on this difference in definitions. An area that was historically a wetland under either definition has been ditched and drained so that the soils are no longer saturated because the water has been effectively removed. Some plants listed as wetland vegetation may remain because they can tolerate the absence of saturated soils, although they would likely be less vigorous than the same plants in a normal wetland situation. Even if those plants were to be replaced by vegetation not listed by the NWI, the soils in the area would continue to exhibit distinctive coloring and other hydric characteristics, such as organic content, for many years in the absence of inundation or saturation by water. The NWI would continue to include the area as a wetland due to the presence of the listed plants, the hydric soils, or both. However, that area would no longer fit the Corps and EPA definition of wetlands.

Senator **Stafford**. In your prepared testimony it states that the corps takes "quick but reasonable action" to enforce the need for permits. But the committee has been given evidence that the corps ignored Fish and Wildlife Service reports of an illegal fill in New Jersey for 5 years, during which time 120 acres were filled. I am speaking of the Bonano landfill on the Passaic River.

Do you consider this "quick action," and why did the corps ignore Fish and Wildlife Service requests for action in this case? Of course, I understand this may have occurred before you were Acting Secretary.

Mr. **Dawson**. Yes, sir; and I am not familiar with the particulars there. But one theme that I have noticed that may or may not apply here, and I think your question expresses a valid concern, but I have seen situations where the Fish and Wildlife Service equates ignoring with failing to agree. I would doubt that their reports were ignored for 5 years. We may need to do a better job, though, at making sure the particulars of those reports are analyzed and responded to.

Senator STAFFORD. Thank you very much, Mr. Dawson.

Mr. Chairman, I will yield back the balance of my time to others who may need it more.

Senator CHAFEE. Thank you very much, Senator.

Senator Lautenberg?

Senator LAUTENBERG. Thank you, Mr. Chairman.

Mr. Gordon, you heard my opening comments and you know that my examination of the 404 permitting process focuses around Westway because I think that demonstrates pretty much the weakness that we are concerned about. I wonder if you could briefly give me the history of your involvement in the Westway project.

Mr. GORDON. Thank you, Senator. My experience with Westway goes back, I think, almost to its very inception. I was Regional Director in the NMFS Northeast Region at the time. This request to fill 234 acres along the lower Hudson, roughly 4½ miles, with construction of a highway river, came into being. We didn't oppose construction of the highway and felt that such a highway could be built on land that was an alternate to fill, that there was an ample opportunity at that time to do so.

Senator LAUTENBERG. That was an alternative to fill, did you say?

Mr. GORDON. Alternative to filling this area in. We remain concerned over that almost 11 or 12 years now, and consistently oppose filling in the inner pier area, it is almost a unique environment, since for the striped bass. Our concern remains over the striped bass and the associated living marine resources that inhabit that area.

Senator LAUTENBERG. You described the potential impact on striped bass in a few words. Could you define the dimension of what you think the problem might be for the record here?

Mr. GORDON. Yes, sir. We understand, although not completely, that this inner pier area is unique environmentally. It is a mixing of freshwater coming down the Hudson and saltwater intrusion from the ocean. This apparently is a unique critical area for the overwintering of the juvenile striped bass.

It is estimated that some 33 percent, or thereabouts, would be displaced if this project were to go ahead. From the standpoint of a manager of marine resources, it is a very high risk to impose on a stock of fish on the east coast as endangered by other environmental aspects, such as the problems in the Chesapeake Bay. This population in the Hudson is one of two that contributes to the ocean fishery. So it is not just the citizens of New York or adjacent States that would be affected but the entire population since this resource migrates clear up to Maine.

Senator LAUTENBERG. It is fair to say then, isn't it, Mr. Gordon, that this has national policy implications?

Mr. GORDON. Yes, sir.

Senator LAUTENBERG. Just to press a little bit further, Mr. Gordon, did you once say that the landfill would do permanent and irretrievable damage to the striped bass in contravention of the Atlantic Striped Bass Conservation Act? Is that correct?

Mr. **Gordon**. As we see it, yes, sir. We do not see alternative environments for the striped bass to inhabit, that it is a unique resource on the east coast. It has been transplanted elsewhere, that is true, but nevertheless its habitat is fairly narrow in what it can tolerate. If we continue to degrade what remains, then we are concerned for its very existence as a wild stock.

Senator **Lautenberg**. We from the east coast area share your view and share your concerns. Striped bass fishing is a precious resource, commercially, recreationally, et cetera, and the whole balance of fish life in our region is very seriously questioned. We see its depletion coming with constant curtailment of fishing, and we hold our breath, frankly. I share again your view.

What was the official recommendation then in terms of the permitting process? You have a voice there. What did you say to Washington on that?

Mr. **Gordon**. When it was elevated to the Washington office in various go-rounds, consistently the agency recommended to the next level that the project not go forward as it was designed and look for an alternative, at least the alternative that would be least damaging to the environment. And we remain concerned and willing to work toward that purpose.

At the last go-round, after some serious debate at the National Oceanic and Atmospheric Administration, the Acting Administrator, Dr. Calio, went forward with a recommendation that with certain conditions, the project could go ahead. Those conditions were fairly extensive for the applicant, to find or construct alternative habitat sites, recognizing that there is no proof that an alternate could be constructed.

Senator **Lautenberg**. Do you know whether those conditions have been met in the context of the issuing of the permit finally?

Mr. **Gordon**. I believe they are incorporated into the permit as it presently stands, yes, sir.

Senator **Lautenberg**. Could you quickly identify the critical elements in those conditions for me?

Mr. **Gordon**. The principal one would be to have an advisory group which would evaluate the project as it moved along, recognizing it would take some 10 years to complete, and that the group would continue studying the striped bass. If problems occurr, adjustments could be made. Also, it intended to consider that other pier areas might be constructed as alternates to that particular site along the Hudson River.

Senator **Lautenberg**. Mr. Gordon, you are a respected professional here. It is a problem you have studied for a long time. Would those conditions, a commission, et cetera, make you feel comfortable that spawning areas the size of the population of the striped bass be protected?

Mr. **Gordon**. There is no guarantee, sir.

Senator **Lautenberg**. As a matter of fact, there might not even be a likelihood. There is perhaps not even a likelihood.

I would ask you, Mr. Potter, when the district engineer sat down and decided if a permit should be issued in this case, he had before him, and this is just a general question, a negative reaction from certainly each of your two agencies. After he made his decision to go forward, all three agencies reversed their positions, those taken by the regional office. Did suddenly the environment improve? What might have happened to suddenly have us all feel better about the fact that the things you worried about for so many years were not really a problem? Do any of you have any idea?

Mr. POTTER. Senator, I do not think that anything changed.

Senator LAUTENBERG. Something changed. I mean you had recommended against this.

Mr. POTTER. We did within the context of the environmental impact analysis issue, that is NEPA. The issue as it relates to the issuance of a permit is different. The real question is exactly what is that habitat, and what function does it provide for those fish? We have some uncertainty about that.

In all fairness, I think that the adequacy of studies is an issue. I think it is currently being litigated.

Our recommendations were also contained in the letter that we sent which recommended against elevation, and they were very similar to the recommendations of the National Marine Fisheries Service. The district engineer had the flexibility to condition this permit in such a way as to develop studies and gain information about what the role of that habitat was in the overwintering cycle of these fish. We had good evidence that the fish do not actually stay in the area necessarily but they come through there. We have statistical differences of opinion as to how frequently and in what quantity.

The issue then is what do you do to replace an area that you really do not know that much about? That is really the issue. And it is a mitigation question, which is a different question in the context of 404 than we were addressing in the context of NEPA.

Our recommendations addressed the mitigation question and made certain recommendations that the corps could or could not follow up on as they wished. We felt that there was no purpose in going any further at that point because there was nothing to be gained by further elevating under the permit process. Everything is on the record and everything has been for some time.

Senator LAUTENBERG. My time is up, but I intend to come back to this, Mr. Chairman.

Senator CHAFEE. Senator Mitchell.

Senator MITCHELL. Thank you very much, Mr. Chairman.

Mr. Dawson, as I indicated in my opening remarks, I would like to address two areas. One is the jurisdiction over isolated wetlands and the second is the definition of fill material. I would like to, if I could, go to the first.

As you will recall, in 1975, in the case of the *Natural Resource Defense Council* v. *Calloway,* the court held that Congress, in enacting the 1972 amendments, had, and I now quote the court: "asserted Federal jurisdiction over the Nation's waters to the maximum extent permissible under the commerce clause of the Constitution." The court found the corps regulations implementing section 404 were too narrow and directed the corps to publish new regulations clearly recognizing the full regulatory mandate of the act. That culminated in the publication of final regulations in 1977, which, as you know, defined waters of the United States to include all waters, the degradation or destruction of which could affect interstate commerce.

Following the 1981 so-called regulatory reform report by the task force headed by the Vice President, the corps has taken what can only be described as an increasingly narrow view of its jurisdiction in this area and has adopted what I think are policies that are clearly inconsistent with the law.

As one example, I have before me correspondence between General Dacey, who is with the southwest division, and the headquarters here on that subject, which I am sure you are familiar with, in which he first asked for a national determination saying that this is obviously something that requires a national determination. His request for a national determination was rejected on the grounds that this is something that we are working on, that the letter back to him said:

> I believe we need to defer resolution of this issue on a national basis until certain of the ongoing administrative and legal actions have been concluded. At that time we will have a better idea of how the interstate commerce question should be addressed.

Then it went on, "In the interim, we encourage division engineers to establish their own criteria." He then established criteria, one of which he describes as a significance of the effect on commerce. Then he goes on to say:

> As a general proposition, it can be said that only those activities which have a substantial effect on interstate commerce would be sufficient to bring an area into federal jurisdiction. The limited use of a water by a migratory species in interstate traveling has been determined to be insufficient to establish jurisdiction in several successful Corps determinations.

Those may have been determinations by the corps, and that is one local policy. I don't know whether others are following the same thing. But it seems clear that is not what the courts of this country have said jurisdiction ought to be. And in a variety of circumstances, unrelated to this area, the Supreme Court has held over and over again that the power of the Congress under the commerce clause is not limited to instances in which the individual occurrence has a significant effect on commerce but is in fact much broader than that, and it has authorized Congress to regulate what may in isolation be deemed purely local matters but which either indirectly or in the aggregate with other similar events across the country have an effect.

In the *Yujack* case, with which I am sure you are familiar, in which the Court of Appeals in the 10th Circuit upheld the Army's jurisdiction over a lake in Utah, the court said, in effect, paraphrasing the Supreme Court:

> The triviality of an individual act is irrelevant so long as the class of such acts might reasonably be deemed nationally significant in their aggregate economic effect.

That is virtually diametrically opposite to the policy now being pursued as stated by General Dacey in his letter to the corps headquarters.

My question to you is this, after that long preface: Is there a national policy; and, if there is, what is it? While the response to General Dacey indicated that there had been a lot of cases in this area, there have been, but all the cases seem to go one way, and that is to assert the maximum jurisdiction possible under the commerce clause of the Constitution, which the Supreme Court in many other instances has deemed to be far broader than that which the corps has instituted in this area.

Mr. DAWSON. Senator, I am not familiar with or don't recall the General Dacey correspondence and would like to look at that and get back to you in more detail.

But I might say generally that I do not agree with your concern about the narrowing view of jurisdiction. We have not done anything as part of the regulatory reform to narrow the regulatory jurisdiction of the program. One of the mandates that the Vice President gave us was to try to clarify the definition of the corps' jurisdiction. I think that is a need that we would all agree exists because most of the people who apply for a Corps of Engineers permit are not large companies with a lot of lawyers and wetland scientists to help them interpret it. So we need something that is understandable. We have not made any headway, frankly, in clarifying that jurisdiction.

But I want to emphasize again that we have done nothing, to my knowledge, to narrow the jurisdictional scope of the program.

Senator MITCHELL. If I could just interrupt, failure to assert jurisdiction in repeated instances in which it may exist, in which I believe and others believe it does exist, is certainly narrowing of the jurisdiction. It may not be pursuant to a policy, but remember, almost invariably no decision is a decision on its own.

Mr. DAWSON. Agreed, but I would ask we be given, as I am sure you would be willing to do, as many specifics on this as possible because I don't believe that that policy, stated or unstated, has occurred. If it has, then certainly we would want to move to address it.

The problem, Senator, of what constitutes interstate commerce, as you well know, is a very difficult legal definition that is not unique to 404 but goes into many, many other areas of where you draw the line. This area is not one where people are litigation wary. And I would submit to you that if we were violating the case law or statutory law, that we would not do it very long without litigation.

I believe again that when there are particular instances of this, we want to know about it and we want to work with you to try to do a good job with it.

Senator MITCHELL. Let me ask you a specific question then. Do you agree that isolated wetlands are within the corps' section 404 jurisdiction where they are used by migratory fowl, waterfowl, which establishes the interstate commerce basis for jurisdiction?

Mr. DAWSON. Senator, I don't think it would be wise for me to address in a legal way that question. I don't suggest there is anything improper about the question. But in the cases, the few cases, that I am familiar with, and I am sure there are many others I am not familiar with, the extent of use by migratory fowl and the location and size and all of those things enter in. I would be reluctant and I think less than forthright with you if I answered that yes or no.

What I would ask your permission to do is address it for the record with the benefit of the legal advice that I could offer. That I think would be a more valuable answer for you.

Senator MITCHELL. I wish you would do that because it seems to me if you are going to take the position regarding jurisdiction that ultimately enough Members of Congress, a majority, believe is inconsistent with what the intent of Congress was when we wrote the original law, we may have to make revisions in the law to make it clear what the extent of jurisdiction is. And it would be very helpful if we could get a clear written statement, as detailed as possible, under the circumstances of what the corps policy is in this regard. That would be extremely helpful.

Mr. DAWSON. Yes.

[The information requested follows:]

The same definition of the term "waters of the United States" which has the force of law is found in EPA and Corps regulations. (See 40 CFR 122.2, 40 CFR 230.3(s), and 33 CFR 323.2(a).) The part of that definition relevant to isolated waters is the following:

"All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

"Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

"From which fish or shell fish are or could be taken and sold in interstate or foreign commerce; or

"Which are used or could be used for industrial purposes by industries in interstate commerce;

"All impoundments of waters otherwise defined as waters of the United States under this definition."

The "Memorandum of Understanding, Geographical Jurisdiction of the Section 404 Programs" between the Corps and the EPA, originally signed in April 1980 guides the application of this definition on a case-by-case basis. According to this memorandum, unless EPA has indentified a category of possible "waters of the United States" as a "special case" category, Corps district engineers normally will make jurisidictional calls, including determinations whether an isolated water body is a "water of the United States."

It is also true that the U.S. Supreme Court may provide important guidance on the general subject of 404 jurisdiction in *United States* v. *Riverside Bayview Homes,* where the Federal Government is arguing the Clean Water Act jurisdiction extends to the full extend of the Commerce Clause.

The starting point for any inquiry into jurisdictional determinations should be former Attorney General Civiletti's opinion of September 5, 1979, which determined the following:

"I therefore conclude that the structure and intend of the Act support an interpretation of Section 404 that gives the Administrator the final administrative responsibility for construing the term "navigable waters."

It would follow that no guidance of general applicability can be promulgated by Army on the subject of CWA jurisdiction over isolated waters unless EPA concurs with that guidance.

There are two Federal court cases that have held that CWA Section 404 jurisdiction did not exist for areas where the Corps or EPA had attemped to assert it. They are *United States* v. *Riverside Bayview Homes* and *United States* v. *City of Fort Pierre,* South Dakota, Cir. No. 84-1162 (8th Cir. 1984). We have appealed the *Riverside Bayview* case to the Supreme Court as noted in paragraph 3 above.

There are some instances in the field where no connection with interstate commerce was found and they were only after an evaluation of the factors specific in 40 CFR 230.3(s) as noted in paragraph 1. Most of those were in playa lakes in Texas where the lakes are small and are dry for most of the year. Since factual circumstances vary so widely in the field, we have been unable to refine the guidance any further and believe it is best to make those case-by-case factual determinations at the field level.

Senator CHAFEE. Senator Symms?

Senator SYMMS. Thank you, Mr. Chairman.

Mr. Dawson, how frequent are these disputes between the corps and the Wildlife Service? I guess I could ask it to both you and Mr. Potter.

Mr. DAWSON. Senator Symms, I think this point goes to the heart of whether the MOA's are deficient, as we have been told this morning. I believe the record is quite good, when you look at the thousands of permitting actions that occur and the relatively small number that any of the other agencies raise a dispute about.

From July 1982 to December 1983, for example, and I am referring to Fish and Wildlife Service data here, there were some 18,000 permitting actions and only 305 cases were even of initial concern to the Fish and Wildlife Service. Out of these 305, 65 percent were resolved to the Fish and Wildlife Service's satisfaction, 7 percent were referred under the MOA, 8 percent were dropped, and some 20 percent are still pending.

So I think the answer is that a very, very small percentage of cases are actually problem cases for us. In my judgment, that would argue that the MOA's, while imperfect, are working quite well.

Senator SYMMS. I guess I should have asked the question this way, is there ever a case where the Corps of Engineers grants a permit that the Fish and Wildlife Service doesn't approve?

Mr. DAWSON. Yes, sir, there are. If I might take that opportunity to go back to the 1977 legislative history that has been referred to earlier, section 404(q) under which these MOA's——

Senator SYMMS. Wait a minute. I mean have you ever had a permit granted that the Fish and Wildlife Service didn't approve of?

Mr. DAWSON. Yes.

Senator SYMMS. You mean somebody actually got the permit?

Mr. DAWSON. Yes, sir. The basis of that is, as I was beginning to say, that 404(q), reading the legislative history, was designed to expedite the process. Nowhere in the law is there any mention of elevation, as the other agencies have discussed. There is an opportunity for them to express their views, but the ultimate authority rests with the corps, so long as the district engineer has given full and fair consideration to the views of the other agencies. But he still may proceed even in those rare cases where there is not agreement.

Senator SYMMS. Does the corps, for example, ever deny any permits for clearing hardwood trees off bottomlands?

Mr. DAWSON. Yes, indeed.

Senator SYMMS. Not prompted from the other services.

Mr. DAWSON. I am sure when they do deny the permits, the other agencies have participated in that. And I can get you for the record the exact number. But I know there has been a significant number of permit applications denied in the bottomland hardwoods area by the corps in the recent past.

[The information referred to follows:]

Fourteen permit applications, which were related to the clearing of hardwood trees off bottomlands, have been denied since October 1, 1983. There is an increased public awareness of the importance of wetlands which probably results in a tendancy to discourage permit requests for wetland alternations. In pre-application consultations, applicants are advised to avoid, if possible, wetland impacts. When permits are issued to perform work in wetlands, special conditions are added to minimize impacts. Finally, the high cost of wetlands alteration is probably a disincentive to perform such work. In other words, a number of factors, other than permit denials, have discouraged wetland alteration activities.

Senator SYMMS. Then with respect to all the mitigation that is recommended, I get the impression that the Fish and Wildlife Service is not happy with some of the corps action on mitigation; is that correct? Why doesn't the corps include all the mitigation recommended in the memorandum of agreement?

Mr. DAWSON. Well, sir, under the law, we are required to mitigate in a fair way on any permit action. The views of the Fish and Wildlife Service are very important. Their views, though, again, under the law, and they are doing their job, are single-purpose oriented. Their recommendation on mitigation, while important, and often followed, quite often followed by the corps, cannot be accepted without scrutiny. I think it is the district engineer's job to review that and to make his own judgment about the fairness of mitigation requirements.

Senator SYMMS. I thank you very much. I would like to go back just to that question. In other words, the Fish and Wildlife Service does not hold a veto per se. You stated that 65 percent of those that you have approved, 65 percent were resolved on the permits, out of how many thousand permits did you say?

Mr. DAWSON. Well, sir, the point in this one sample, statistical sample, from July 1982 to December 1983, there were some 18,000 actions. Only 305 of those, a very, very small percentage—I am not sure of the percentage——

Senator SYMMS. In other words, the Fish and Wildlife Service agreed with all but 305?

Mr. DAWSON. Those were the only ones that they expressed even initial concern. The 65 percent comes in that that is the percentage, out of that very small number of 305, that were resolved before the district engineer made his decision.

Senator SYMMS. Of the 305, most of them were resolved. But what about the 20 percent you mentioned that are still pending? How many is that, 20 percent of 18,000 or 20 percent of 305?

Mr. DAWSON. Of 305.

Senator SYMMS. So you are talking about in 60 cases, permits are pending.

Mr. DAWSON. That is probably a fair estimate.

Senator SYMMS. But the point is, in all the other instances, the Fish and Wildlife Service approved those permits. You didn't have a real roadblock from them.

Mr. DAWSON. Yes, sir. The point I think to be made is that the vast majority, the overwhelming majority, of actions that the Corps of Engineers is handling, the process is working very well. I think the public is being much better served in that we are moving these along in a more predictable and expedited way.

Senator SYMMS. Is it your concern that if a new memorandum of understanding is agreed upon, it may not work as well as this is working.

Mr. DAWSON. That is correct. And I think the concern that has been expressed, that we have to continue to address, is are the environmental safeguards still given the required consideration. In my judgment, they are.

Senator SYMMS. Do you think there would ever be a case where there would be a real conflict if the Fish and Wildlife Service, Mr. Potter, came to you and raised a ruckus, that you would run roughshod over them, or would you stop and take a look at it?

Mr. DAWSON. Sir, in the 20-some-odd cases that have been requested to be elevated, I believe the statistics are that we have granted about half of those, to ensure that there is a high level review as requested by the other agencies.

Senator SYMMS. Do you want to comment on that, Mr. Potter?

Mr. POTTER. The number is actually closer to a third. There were 21 elevations sought. Eight of those were granted. One was actually accepted ultimately, seven of them were denied. These are the most recent figures. I think the figures Bob was giving you are data we gave the corps.

Senator SYMMS. Are you telling me then that you think of the 8 of the 21 that are relevant, the Fish and Wildlife Service is saying they shouldn't have been granted?

Mr. POTTER. That is correct. Those are the ones that we actually chose to request elevation on. There were others that we were concerned about and for various reasons did not request elevation. Usually the reasons are related to my earlier statement; that is, there is no criterion for elevation based on environmental concerns and therefore we do not understand within the context of the MOA what our basis for requesting the elevation would be.

Senator SYMMS. Thank you, Mr. Chairman.

Senator CHAFEE. Just to get it on the record here, there has been a lot of talk about the vice president's task force and what the objectives are. I would just like to read from the Office of the Vice President, May 7, 1982, Executive Director of the task force, who wrote Mr. Gianelli, who was the leader of this 404 task force.

"I am confident that under your leadership the implementation phase will meet with equal success." In other words, they had a preliminary study on the 404 and this was the next step, and this was Christopher DeMuth who was the Executive Director of the President's Task Force on Regulatory Relief. This is what the objectives were. "Reducing substantially the burdens and uncertainties that have beset the section 404 program without compromising its importance in environmental protection." So the whole objective of the task force wasn't just to get speed, it was also to not compromise these important environmental protections. I hope everybody bears that in mind as we refer to the task force doing this or that.

Now, Ms. Cooper, you testified last time about the MOA, your problems with the Corps of Engineers; and, as a matter of fact, Mr. Ruckelshaus terminated it a year ago.

What are the adjustments you seek from the Army? Why are they needed?

Ms. COOPER. The three major adjustments we seek are somewhat parallel to what the Fish and Wildlife concerns. The first adjustment we are seeking is an interim level of review by the division engineer on controversial decisions by the district engineer.

The second adjustment would be to revise the current criteria for elevation of decisions or elevation of requests to include questions regarding compliance with the 404(b)(1) guidelines. Right now there are three criteria for elevation—insufficient interagency coordination, new information not previously available, and environmental issues of national importance. We believe that compliance with the (b)(1) guidelines should be an added criteria for elevation.

The third area of EPA concern is delegation of our Regional Administrator's signature authority for correspondence to the corps district on issues covered under the MOA.

We believe that these areas of concern can be resolved without significantly adding to the permit processing time. At this point in time, EPA and the corps continue to operate under the old MOA as though we had it in place. We have not broached this with Mr. Dawson yet, but we are considering asking whether it might be advisable to go through environmental mediation to resolve those issues.

Senator CHAFEE. The old MOA was cancelled; is that right?

Ms. COOPER. The old MOA was cancelled as of December 1984.

Senator CHAFEE. So you are trying to get this new one.

Ms. COOPER. We are trying to negotiate a new one. In memoranda back and forth between Mr. Dawson and myself, we agreed to operate under the old MOA until such time as we could get a new one on the books.

Senator CHAFEE. How are you doing in getting your new one? Are you getting anywhere?

Ms. COOPER. Not very well. We had a number of meetings in 1984 and basically reached a point where we seemed to be at a stalemate. We are ready to begin the negotiations again. I would say that we have operated fairly successfully under the old MOA since that time.

Senator CHAFEE. Except Mr. Ruckelshaus canceled it. He obviously thought there were flaws to it.

Ms. COOPER. Well, I have described the flaws. There were a number of other concerns which we have resolved. But these are the three outstanding problems. They are probably the most critical.

Senator CHAFEE. Now, Mr. Dawson, what about this? When are you going to resolve these problems?

Mr. DAWSON. Mr. Chairman, we would certainly like to resolve them, to move on to other issues, and to be responsive to your strong interest which has been expressed many times. We believe we have been open and, in fact, as I mentioned in the discussion with Mr. Potter, we feel we have reached, at the staff level, agreement on four out of the five.

Senator CHAFEE. We are short on time. Let me just say this, Mr. Dawson. Obviously this committee can't write MOA's between you folks. You have said that you have reached an agreement in principle, I think you said earlier in response to the questions, Mr. Dawson, on four of the five points. I must say agreement in principle, I don't want to chastise you for using that, but agreement in principle covers a lot of sins, as you know. There is a long way from agreement in principle to getting it down in writing.

It is just my hope that you will get these MOA's resolved. I am going to stay in touch with this. I am interested, as you indicated, and will be talking with you and will get you back up here again to see how we are doing on these.

Now, turning to the interstate commerce and the points that Senator Mitchell was raising, here is our problem: It seems to me that what you are doing is taking a very narrow view of what your jurisdiction is. Obviously, you can take a narrow view if you wish. But the courts have clearly said that your jurisdiction goes out there. And it wasn't just in a case, it was a case that you brought, that the Corps of Engineers brought. That *Utah* case was a case where the Corps of Engineers sought jurisdiction and the court said you have jurisdiction. You have jurisdiction because they take fish out of the lake that are sold in interstate commerce. You have jurisdiction because 2 percent of the visitors that come to that lake are from out of State. You have jurisdiction because birds on their flyways come there and they are interstate flyways and land there.

So that the point of view you are taking in limiting it, in saying in your letter to me, you wrote, "The interstate commerce nexus which triggers jurisdiction in isolated waters is being clearly examined." Now, by the way, isolated waters are significant. Isolated waters amount to 13 million acres of wetlands. So this isn't just some trivial thing we are talking about. Thirteen million acres of wetlands is a tremendous number of wetlands.

"There is no clear way to describe this connection, and judicial rulings vary widely." I don't know at all that judicial rulings vary widely. I think they are consistent. Where is our legal expert? Senator Mitchell, certainly in your questions you indicated that they don't vary widely. I am not putting you on the spot. I can just remember in law school the case of the elevator operator in a building in some downtown city is covered by interstate commerce because even though he goes up and down the elevator, which doesn't go between States in any way, the people that ride the elevator might come from other States; therefore, they have jurisdiction.

Senator **Mitchell**. Mr. Chairman, the classic case, a landmark case establishing jurisdiction involves taxicabs in Chicago which went from one train station to another.

Senator **Chafee**. Within Chicago?

Senator **Mitchell**. Within Chicago. I think most anybody who has been a law student will recall that. They took people who traveled between a very short distance within Chicago and the court held they were subject to regulation in interstate commerce because some of the people in the taxis would be traveling intrastate.

Senator **Chafee**. Sure.

By the way, I was delighted with that *Marsh* case I have just cited to you. Furthermore, it was written by a law school classmate of mine, which makes it even better, Chief Judge Holloway.

"Our best judgment," you say, "will be used in determining whether an isolated water falls within section 404 jurisdiction." You have, as I understand, 37 districts; is that right?

Mr. **Dawson**. Yes, sir.

Senator **Chafee**. It is my understanding that you have told these 37 districts go your own way on this. Is that correct?

Mr. DAWSON. I don't believe that is the best characterization, Senator. As you point out, the case you have cited was brought by the corps in support of its jurisdictional finding.

The point we have tried to make in communicating with our districts is this is a very difficult issue to articulate because what constitutes in an individual case interstate commerce gets litigated over, and I don't think it would be wise for us to pronounce all of the boundaries of that from Washington.

Senator CHAFEE. You show me a case that has ever been won on the other side.

Mr. DAWSON. I am not arguing that there is, Senator. I am arguing, if I am arguing at this point, we have not narrowed the jurisdiction.

Senator CHAFEE. I don't know how you can say that. It isn't that you have narrowed it. It is just you haven't taken jurisdiction.

Mr. DAWSON. I haven't what?

Senator CHAFEE. You have not taken jurisdiction. You said to your 37 people, you can phrase it the way you want, but the summation of it is do what you want, we don't have a policy. And under that, why in the world wouldn't every district person, to protect his own hide, not do anything to extend it?

Mr. DAWSON. But I think again, Senator, the record on that jurisdictional claim and call by the corps is not changed. I would submit that we could not show there has been any change in the application of the jurisdiction in the field. And I certainly can tell you that we have not asked for, nor implied, that there should be any jurisdictional narrowing out in the field.

As you point out, the case cited, and there are other cases cited where it has been the Corps of Engineers' jurisdictional claim that has been attacked by those who say we are reaching too far. And in this one case, and in most others, as you say, our judgment has been sustained.

Senator CHAFEE. Here is a letter from General Dacey from the Southwestern Division, of December 31, in which he says, "Their response," meaning the Army, "of October 11, 1984 declined to set national policy. It will be this division's policy to primarily consider two factors, on a case-by-case basis," so forth and so on.

Senator MITCHELL. Mr. Chairman, I have before me the October 11 letter. I suggest you may want to put it in the record.

Senator CHAFEE. This is from Mr. Dawson?

Senator MITCHELL. No, not from Mr. Dawson. It is from Colonel Edgar, by Major General Wall. It says:

> In the interim, we have no objection to and in fact we encourage division engineers, working with their district engineers, to establish uniform criteria for making required interstate commerce determinations within their division.

So actually it encourages each division to have their own criteria for making this decision, which by definition is national in character because the question itself is what is the status of the reach of Congress under the commerce clause of the Constitution, and is interstate commerce involved.

Senator CHAFEE. What was the point of bringing the case, Mr. Dawson? So you get jurisdiction over one lake. Doesn't that give you a direction to go? The courts made a decision. What was it, the ninth circuit? The ninth circuit court made a decision. Now, does that mean anything, or does that just tell you to tell everybody go your own way?

Mr. DAWSON. No, sir, it certainly does mean a lot. I think the question, though, is how much prescribing from Washington on the details of how many landings by how many ducks and just what the particular criteria would be, I think I could argue that that should be left to the regional division where they know better than I what the extent of interstate commerce is.

Senator CHAFEE. Let's take the easiest one. A 300-acre lake would be up to the local district engineer to decide whether that is in interstate commerce or not?

Mr. DAWSON. I am not sure what the significance of 300 acres is. I think with interstate commerce, whether an elevator carries 15 persons or 1 person, the issue is not the size but the extent of interstate commerce.

Senator CHAFEE. My time is up. Senator Lautenberg?

Senator LAUTENBERG. Thank you, Mr. Chairman.

I want to get back to where we were. I want to, Mr. Gordon, examine something we discussed. That was the recommendations I think you said were incorporated, to your knowledge, or was it you, Mr. Potter, into the decision you felt by the corps to issue that permit.

Mr. POTTER. I did not mean to say that. What I meant to say was that the district engineer has the authority to condition the permit in such a way that they could incorporate those recommendations. I am not sure whether they have or have not. But our recommendations were consistent.

Senator LAUTENBERG. Mr. Gordon, you expressed your concern very clearly in that a mitigation plan had to be, in your view, accounted for in some way before this permit could be issued. The response we get, and this is in Colonel Griffith's statement of January 24, 1985, when he announced his decision, he says in one part here all of the Federal resource agencies have recommended that the permit be denied, Mr. Dawson, because of its possible impacts on a resource they are charged with protecting. So these are the other agencies, including EPA.

Then Colonel Griffith goes on to say:

> The off-site mitigation structures as proposed by the Department of Transportation are hazards to navigation and may create a potentially severe adverse impact on navigation.

But we don't discuss the impact on the striped bass. He looks at it from a relatively narrow perspective when he issues that report.

Now that is to make the record clear as I see it. If there are any contravening views, I would be willing to hear them, though briefly. And I would ask you, Mr. Dawson, the matter was referred to you, I believe, at one point. You saw each of the agencies represented here today questioned the wisdom of issuing that Westway permit. Did you have the option of reviewing the district engineer's decision before he made it?

Mr. DAWSON. Senator Lautenberg, as you know, this has gone through the process more than once. In the latest procedures, which is what I assume your question directs itself to——

Senator LAUTENBERG. Right.

Mr. DAWSON [continuing]. My office did not review the decision and did not receive an elevation request, if my memory is correct, from any of the agencies.

One statement you made earlier is that you asked for any input that had to do I believe with the statement that the impacts on the striped bass were not considered by the district engineer, I don't believe that is correct. I think a great deal of consideration was, in fact, given to those impacts.

Senator LAUTENBERG. I am sure they were considered. Was there a mitigation plan incorporated into the issuance of the permit?

Mr. DAWSON. Senator, since the decision did not come to my office, I am not familiar with all of the details and would like to supply that for the record. My recollection is that it was either included or there was a mechanism by which mitigation could be provided as the construction ensued.

Senator LAUTENBERG. My recollection is that Colonel Griffith had recommended a mitigation plan but said that he was going to go ahead and issue this permit because he didn't think that the impact might be quite as severe as others did. I think that is where we stood.

Mr. DAWSON. Yes, Senator. I believe he indicated that if those impacts were proven to be serious, then he would have the mitigation plan on hand to implement.

Special condition (b) of the permit requires that the permittee develop a mitigation plan to be implemented during construction of the project. The mitigation plan will be developed in conjunction with an advisory group composed of Federal and State of New York resource agencies, the corps, and two independent fisheries experts.

Senator LAUTENBERG. On its face, Mr. Dawson, you know that is not very persuasive if we are talking about an endangered species, which this almost is. To say well, OK, if we see the last of them down the river, then we better get busy and find some more. That is what I think we are saying.

This was such a sensitive matter. Everybody was looking at it including newspapers in the region. It was discussed down here until everybody was sick and tired of hearing it. Why would not that decision have been passed up to your level or at least have you consulted before it was finally agreed upon?

Mr. DAWSON. Well, sir, I think not to try to speak for my colleagues who could have participated in that kind of review, it was I think a collective judgment that after some 10 to 12 years of study and restudy and review and consideration, that little, if anything, would be gained by additional review on this particular matter, that it had been around so long and had been subjected to extensive review already.

Senator LAUTENBERG. But since Colonel Griffith left several things in question, particularly one of the principal issues, the fact that a lot of time had passed, was not, in my view, sufficient impetus to say OK, listen, we have studied this long enough; even though we don't have the answer, maybe we ought to get on with it. Your predecessor, Mr. Gianelli, after having an appeal from New York, agreed to a reconsideration of Colonel Griffith's recommendation. The corps then conducted an abbreviated study. That was the 2-year study that Colonel Griffith had recommended be done on the implication of the Westway development on the striped bass habitat.

Did you agree with Mr. Gianelli on his decision to reject then the recommendation of the district engineer? Let me rephrase it just in case there is any confusion. Colonel Griffith recommended a 2-year study be done on the implications. Mr. Gianelli, after hearing an appeal from New York, agreed to a reconsideration of Colonel Griffith's recommendation. The corps then conducted an abbreviated study. Were you in agreement with Mr. Gianelli on his decision to reject that recommendation?

Mr. DAWSON. Yes, sir, I was. And I feel that the record has shown that we were able to learn enough from what I know of the matter, and I would like to know more than I do, but from what I know about it, the 1 year did, in fact, provide sufficient data to make the decision.

I might note, Senator Lautenberg, I will do my best to answer all of these questions. I have to say that I am a little uneasy given the litigation that is pending. As you pointed out earlier, this case will either rise or fall in the Federal district courts subject to the appellate court review. And certainly all of these issues are going to be scrutinized in great detail there. But I will certainly, to the extent I know the details, try to be responsive.

Senator LAUTENBERG. Mr. Gordon, apparently the decision was made based on the fact that the impact could be minor. Has that subject been sufficiently studied to say that the impact could be minor?

Mr. GORDON. I don't believe that there has been adequate study done, but given the project and the length that it dragged out, additional study in the short term would not have provided the answers in that respect.

Senator LAUTENBERG. The short-term study would not. But if you had spent the time and had a mitigation plan and so forth, you at least would have had some better assurance the impact would not be as negative.

Mr. GORDON. Well, in looking at it, if 12 years ago we had the benefit of hindsight, we would have initiated studies which I think in this timeframe would have been very conclusive.

Senator LAUTENBERG. Well, we are where we are.

Thank you, Mr. Chairman.

Senator CHAFEE. Thank you, Senator. Senator Mitchell?

Senator MITCHELL. Mr. Dawson, if I could, I would like to address the other subject which I was concerned about, and that is the definition of fill material. As you know, the Clean Water Act expressly prohibits unpermitted discharges of fill material into waters of the United States. The corps, however, has decided not to regulate discharges of fill that are accidental or that are primarily to dispose of waste as opposed to primarily intended to fill. The corps has contended such fill should be regulated by EPA under section 402. EPA argues, in turn, such fills should be regulated by section 404.

This matter has been unresolved for several years now. In an effort to end the dispute, the consent decree under the *National Wildlife Federation* v. *Marsh* case required the corps and the EPA to propose a joint definition within 90 days, or by May 10, 1984. The agencies later requested an additional year in which to determine the regulatory impact of various definitions. That year was up, of course, on May 10, 1985. We still don't have a joint definition, and in the meantime, a good deal of discharging of fill material in the waters of the United States has occurred in an unregulated fashion.

Let me cite one example which has been brought to my attention. In April 1984, the U.S. Fish and Wildlife Service brought to the corps' attention an ongoing unauthorized discharge near Lock Haven, PA, of 120 tons per day of fly and bottom ash and 10 tons per day of paper mill waste into a 980-acre site, half of which consisted of wetlands. According to the Fish and Wildlife Service, land filling under way in the wetland was encroaching on the deep water pond used by waterfowl. The Commonwealth of Pennsylvania expressed a concern the discharge could be harmful to aquatic life and in the process referred to the value of the wetlands.

In response to these concerns, the corps visited the site and confirmed the discharge and yet told the discharger that it wasn't subject to 404 because, and I am reading now, "discharge of material primarily for waste disposal does not constitute a discharge of fill material."

Now, my question is to both you and Ms. Cooper. This has been going on for years. One court deadline was missed. Another deadline has now been missed. In the meantime, a substantial quantity of dumping that is plainly in violation of the law occurs without any enforcement because of internal disagreement between the two agencies. What is the status of a joint definition? When will this matter be resolved in a manner that is acceptable to both agencies so this unauthorized and unlawful discharging will not continue?

Mr. DAWSON. Senator, I share your great concern here, and I don't think there is ever an adequate excuse when two agencies or more than two cannot over time resolve an issue like this. There are good arguments I think on both sides as to where the jurisdiction should best reside.

We have done some work during the year that you mentioned to come up with statistics that I think will help us resolve it. I can't give you a date, as much as I would like to, except to pledge to you that we will do our best and keep you posted on what we are doing and would hope that we could do our job and get this resolved.

Senator MITCHELL. Ms. Cooper?

Ms. COOPER. In trying to come up with this definition, one of the questions that we both had raised is how extensive is the problem? We put our heads together and went to our field operations to look at what kinds of fill we were talking about, as well as the situations, the geographic areas, and the the characteristics of it. We have tried to define which of us should regulate it. Should it be regulated under section 404 or section 402, maintaining either our position or the corps' position.

We are very close to completion of our field study. My staff indicates that within the next 2 to 3 weeks we will complete all of our field work and be able to better define the nature and extent of the problem.

If we had gone to the field and gotten the data 5 years ago we would probably be in a much better position right now to define fill. But I have to agree that without that kind of real information, the decision would not necessarily be the best one.

I think the other part of this decision, and one which affects both of us, is the fact that whoever has jurisdiction for this fill, whatever the definition turns out to be, there may be some very real resource constraints in terms of dollars and people that will have to be addressed at that because it may very well significantly increase our level of activity.

Senator **MITCHELL**. Let me say I, for one, and I think the committee generally, look forward to receiving information from you within the next few weeks. However, in view of the past record, and the fact that this has gone on so long, and the fact that the law is being violated, both of you and your superiors remember when you assumed the office you now hold, you swore to uphold the law. That is what you said you would do. And you know, both of you, that the law is being violated. The only question is whose responsibility is it to enforce it?

I think you should include as a part of your discussions beginning right now some interim measure so that this won't continue. That is, you determine some method of seeing that the law is not violated while you two are trying to decide which one of you—I don't mean this personally of course, but agency—enforces the law on a permanent basis.

It is like a town police officer and a county sheriff arguing over who has jurisdiction over a guy stealing something out of a store. They don't stand there and argue. They go out and they arrest the guy and then they decide, when they have the time and opportunity to do it, who should be responsible in the long run for doing this.

But I don't think you can permit continued violations of the law to occur and just say well, we are still debating it or discussing it. I commend you for what you are doing and I am encouraged by the fact you say a few weeks. But I think in view of the past record, I for one and perhaps other members of the committee would feel better if we had not only progress on a permanent plan but some interim mechanism for seeing the law is not violated with impunity.

Ms. **COOPER**. Let me just say one thing, Senator. I think this is probably characteristic of other situations where we do find unauthorized discharges. We don't simply sit and wait for a decision on who will take action. The Hammermill Paper Co. near Lock Haven, is not now discharging into wetlands. The EPA is now working with them to find acceptable sites for disposal. I think in other situations across the country we have taken similar actions.

So it is not a matter of waiting, but rather it is a matter of not necessarily knowing that the unauthorized discharges are taking place.

Senator **MITCHELL**. I commend you for that, Ms. Cooper.

Mr. **DAWSON**. That is another side of the problem, Senator, in that people who need to take action are stymied because they can't get a permit either way. So there is paralysis from both sides.

Senator MITCHELL. Most of the people who are subject to the environmental laws of this country, indeed all forms of environmental laws, they may not like a particular regulation, but if they don't know the applicability of the law, don't know where to go, that is the least desirable circumstance.

Mr. Chairman, do I have time for another question?

Senator CHAFEE. Yes.

Senator MITCHELL. I would like to go back to the subject we addressed earlier, and that is the question of jurisdiction. I will address the question to Ms. Cooper and then I have one comment to you, Mr. Dawson.

Ms. Cooper, the Attorney General of the United States determined some years ago that the ultimate administrative authority to determine the reach of the navigable waters for the purposes of section 404 resides with EPA. This Administration has supported that opinion in a brief before the Supreme Court in a case known as Riverside Bayview homes, with which you may not be familiar.

My question to you is has EPA used its enforcement authority under sections 301 and 309 to prohibit unpermitted discharges of fill material into the waters of the United States?

Ms. COOPER. We have used our enforcement authorities over unauthorized and unpermitted discharges. That is one of the areas where we have focused our attention. But I might say in view of resource constraints in other areas, our enforcement program in that area has not been as effective as it should have been. However, we have taken enforcement action where we have found unauthorized discharges. That is where we have primarily focused our efforts.

Senator MITCHELL. Thank you.

Mr. Chairman, I would just like to make one comment. Mr. Dawson, you made a statement in response to Senator Chafee's question that you don't think that the office in Washington here ought to be making decisions on individual matters out in the country, that this rests on local facts and local circumstances.

I want to make it clear that I don't think anyone on this committee disagrees with that. We are talking really about two different things. The first is a subject involving national issues, that is the issue of interstate commerce, requiring a clear and specific national policy, which is the responsibility of your office, and its application to individual, specific factual circumstances across the country, which is the responsibility of the individual offices.

I don't want you to misconstrue at least my questioning and think I am suggesting that you have to decide every case in the country. But you have I guess 37 districts and what, 8 or 9 divisions?

Mr. DAWSON. I believe it is 39 districts and 13 divisions.

Senator MITCHELL. Now you have a circumstance in which each division at least has enunciated a policy of its own. So you have 13 policies around the country on something that really ought to be a national policy. That is what I guess General Dacey was asking for, I think quite rightly, and which has been refused to him for the reasons stated in the response.

So I think there is a need for a clear national policy. And as you devise that policy, I strongly encourage you to look at the law expressly set forth by the court in the *Calloway* case, to which I referred earlier, and which I repeat. The court said that Congress, in enacting the 1972 law, had asserted Federal jurisdiction over the Nation's waters to the maximum extent permissible under the commerce clause of the Constitution.

The act has been dealt with by Congress in the interim. Congress has not in that time sought in any way to repudiate or contravene or contradict that court's statement. So you may assume under well established principles of judicial construction that that is a correct statement of the intent of Congress, known to and acquiesced by Congress since then. And the national policy, which it seems to me you must enunciate, must by law incorporate that to the extent possible. That is the law of this country. And you are sworn to uphold and enforce the law, and I know you are a good man who will do that. So we encourage you to do that as promptly and as clearly as possible.

Senator CHAFEE. Thank you, Senator.

Mr. Potter, you heard the discussion I had with Mr. Dawson regarding the failure to establish a connection between interstate commerce and the isolated waters. Now meanwhile, what is happening as far as you see it? What is going on out there? Are we losing any acreage?

Mr. POTTER. The problem, Mr. Chairman, is that we are seeing losses. I guess that is really the key question from our standpoint.

I made a statement earlier when we had the hearing the other day, and Bob has said this morning, that the Fish and Wildlife Service is a single-purpose agency. That is a rather simple characterization of the very broad responsibility which I would call resource management which has become a very complicated, sophisticated business.

By taking over this program lock, stock and barrel, the corps has in effect taken over part of that responsibility. We do have flexibility in the process to do many of the things that we would like to see them do. Without that flexibility, I can assure you that we would not have acquiesced to the MOA in 1982.

We have seen strong signs of continuing wetland losses. And more importantly, we have not seen the consistency in some cases and the protection of environmental values that we were led to believe would come out of the regulatory reform effort.

The real point I want to make is that the corps has a greater responsibility and not a lesser responsibility to a larger constituency. The information and the evidence we are getting is reflecting continuing losses and in some cases confusion and uncertainty about this process. We have a lot of information that shows this. A good deal of it has been shared with the committee. Almost all of it has been shared with the corps.

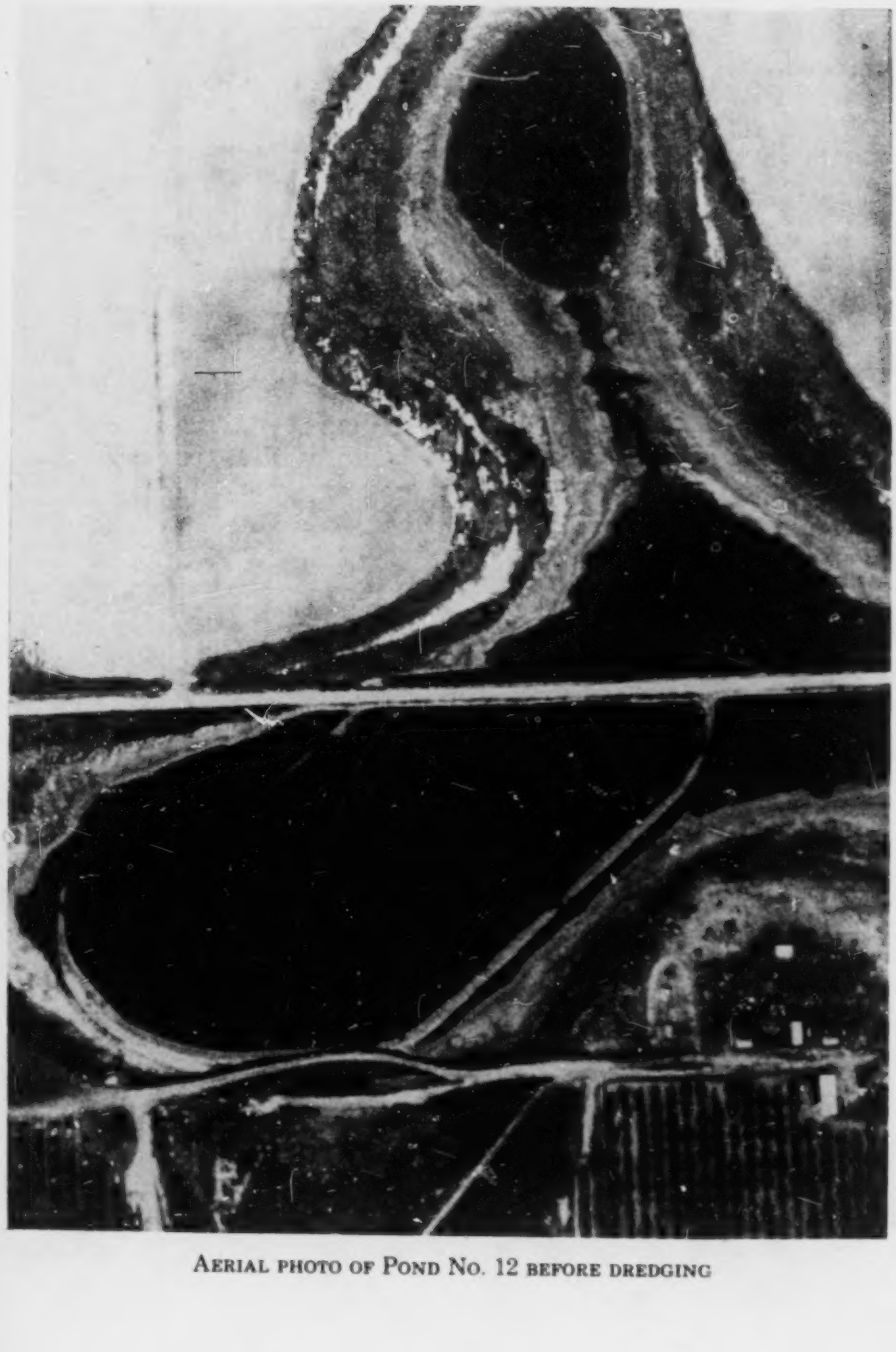
Our feeling is that there needs to be consistency, clarification, and predictability in the process. And until that occurs, there will be concerns and questions and there will be more hearings. I would like to urge Bob and the corps, as we have in the past, to be aware of that and try to be responsive to it.

Senator CHAFEE. In keeping with that, I am going to submit for the record pictures of one of these ponds. It is an area down in the Rio Grande Valley in Texas near the Gulf of Mexico. It was so-called Pond No. 12, 28 acres in size, including adjacent wetlands. Over 50 different species of birds were found. They were clearly covered by the Migratory Bird Treaty Act.

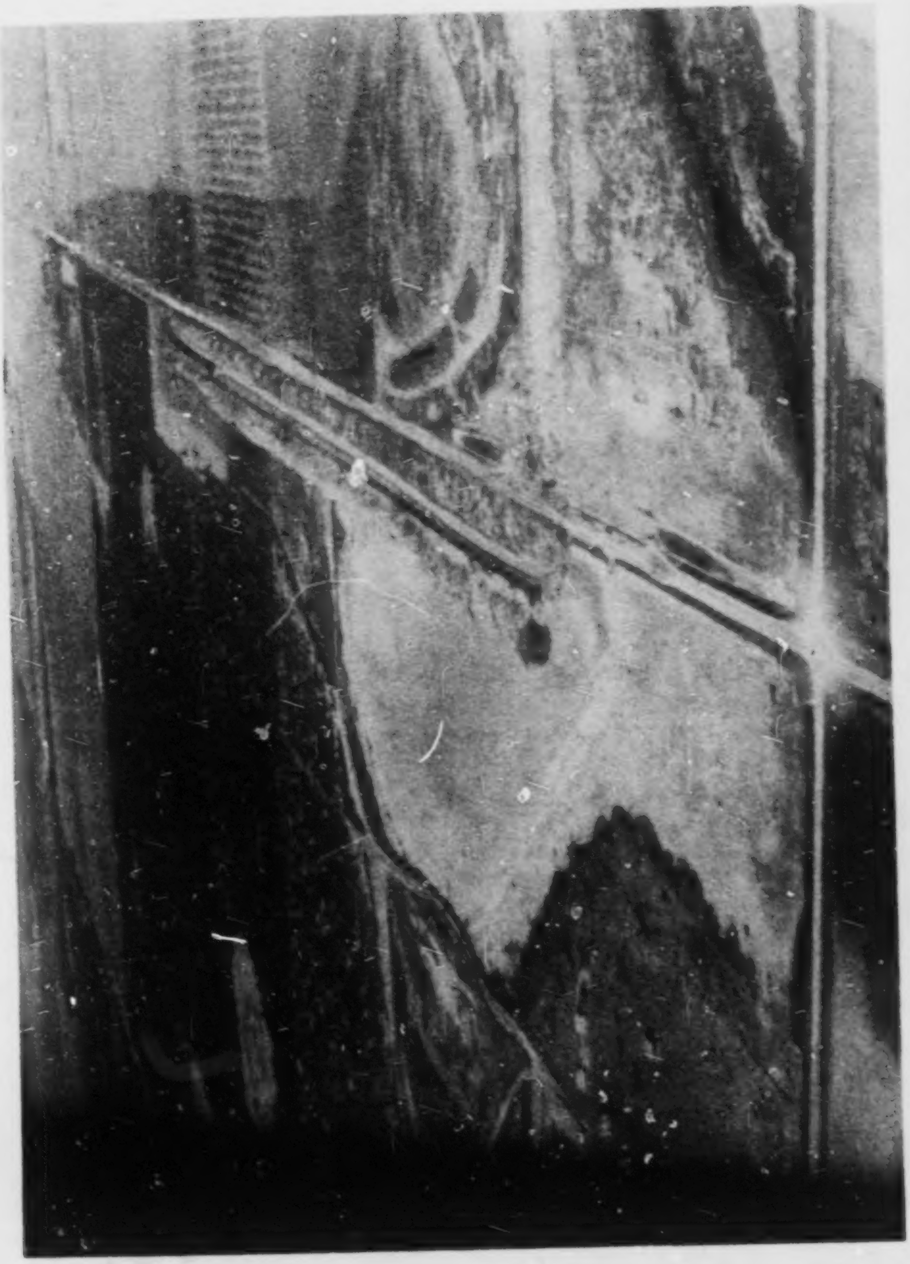
Fish and Wildlife in January 1984 found Pond 12 was being drained by a ditch dredge through its middle. The dredge spoil was being deposited in the pond and wetlands on either side. It immediately brought this unpermitted activity to the attention of the Galveston district of the corps. Five months passed before the corps responded.

I will put these graphic pictures of wetlands disappearing into the record. There was a dredge right through the middle of it and there it is gone.

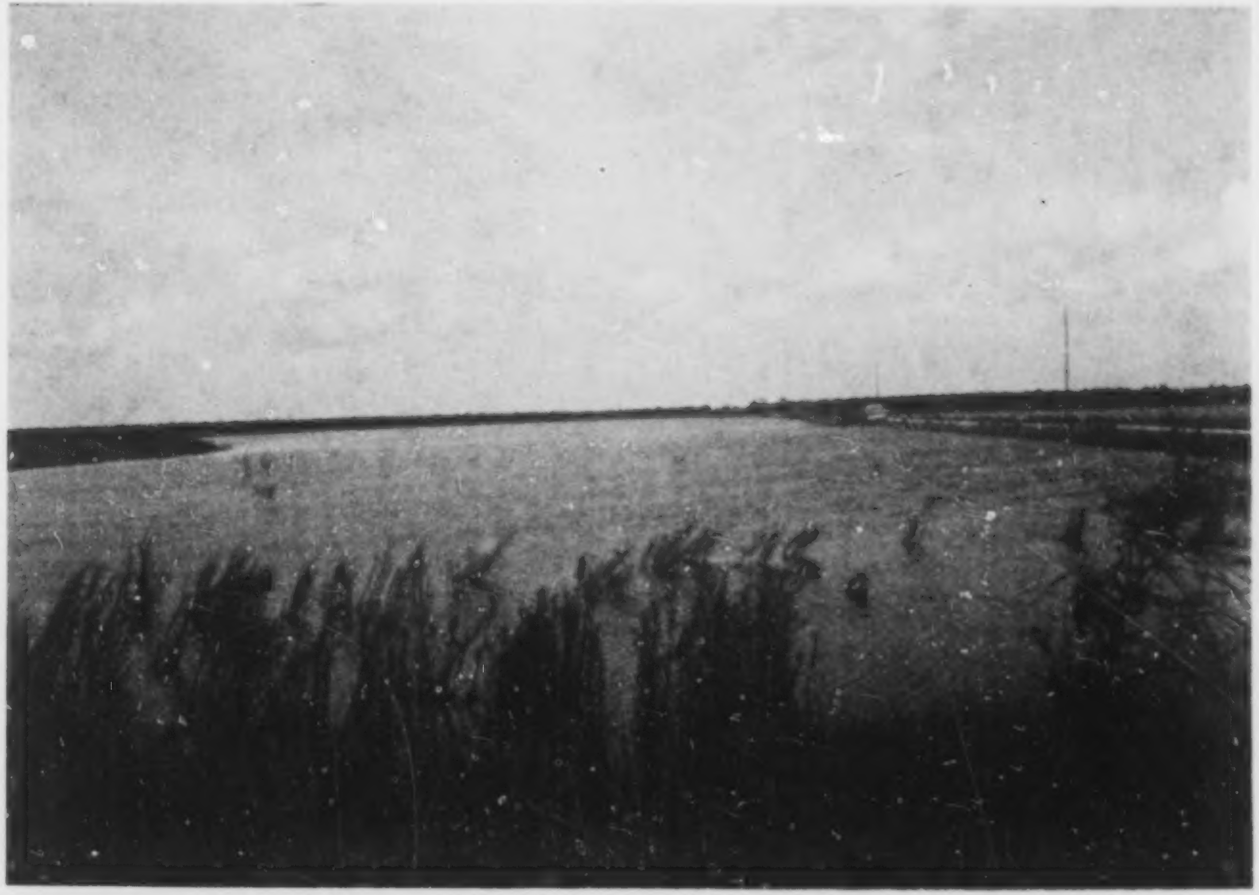
[The pictures referred to follow:]



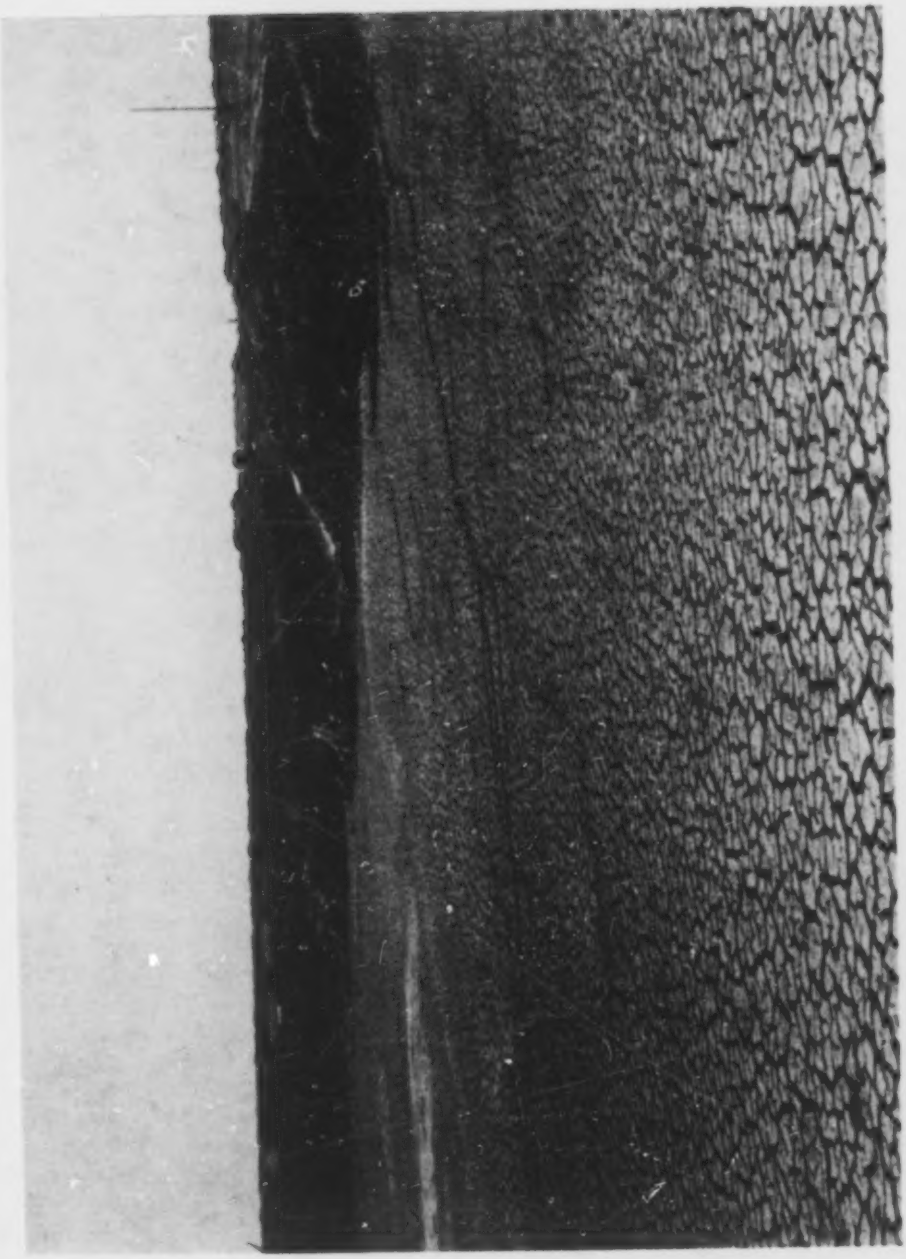
Aerial photo of Pond No. 12 before dredging



Aerial Photo of Pond No. 12 after dredging, showing L-shaped ditch dredged through pond



View of Pond No. 12 (looking toward west), before drainage



View of Pond No. 12 showing dredging by dragline and resulting mudflat

Senator **Chafee**. I would like to get into another area, the definition of fill. I feel like we are in an Alice in Wonderland area here. This, as I understand it, is what the corps has done.

On July 22, 1982, the corps promulgated the following definition of fill.

> The term fill means any material used for the primary purpose of replacing an aquatic area with dry land or changing the bottom elevation of any water body. The term does not include any pollutant discharged into the water primarily to dispose of the waste as that activity is regulated under 402.

Suppose I have a restaurant, I dump everything in the swamp in back of my restaurant. Finally I have continued to dump until I have dumped enough so I can have a parking lot. Under the corps definition, that is okay. That is a discharge. I am discharging garbage out there. I am not filling it.

Does that make sense, Mr. Dawson? Does it all depend on my view of what I consider the primary purpose? I tell you my primary purpose is to get rid of my garbage out there and to get rid of some spoil I have. I am just filling up this place. Incidentally, if at the end of it I can have a big parking lot, that is great, but my primary purpose is just to get rid of this garbage.

Mr. **Dawson**. Mr. Chairman, first, I would not say that it is all right for that fill in your hypothetical.

Senator **Chafee**. I know. But would you say that is a 402 problem?

Mr. **Dawson**. Yes, sir. And the basis for that, the reason it is more rational than I think it might seem on the surface is we feel we have the expertise to deal with the fill question when that is the primary purpose. EPA deals with solid waste disposals every day in every other area except wetlands. So our view is that they are better equipped to deal with the problem than we would be. That has been at the heart. And there are good arguments on the other side.

But I agree with your point, implicit point, that it is not always easy to say what that primary purpose is and what may be an initial primary purpose may evolve into some other purpose later on.

Senator **Chafee**. Well, all right. What do you say, Ms. Cooper?

Ms. Cooper. I think our position has been consistently that fill should be regulated under section 404, whatever the purpose of that fill. That is the nexus of our disagreement. I might add that at this point in time we have provided guidance to our regions on an interim basis to use our enforcement authority to ensure that significant degradation from solid waste fill does not occur.

Senator **Chafee**. Let's take it the other way around. Suppose I have a bulldozer in there and I have a pile of dirt and I just bulldoze it into the swamp. You would say that is a 404 problem, wouldn't you?

Ms. **Cooper**. Yes, sir.

Senator **Chafee**. Yet, as I understand your directions that you sent out to the States, the definition of May 10, 1980, eliminates the primary purpose test. There is no primary purpose test with EPA. You just tell the states fill material means any pollutant which replaces portions of the waters of the United States with dry land or which changes the bottom.

There you didn't have any problem. You made it very clear. I guess you put that all into 404.

Ms. COOPER. But there is disagreement between——

Senator CHAFEE. What bothers me is you can tell the States, without any equivocation, that anything that goes into a swamp, a wetland, is fill. Never mind, it is just fill. It doesn't have to be trash. It can be anythinge Yet you have a different deal when you are dealing with the corps. Why isn't it the same?

Ms. COOPER. It is the responsibility of the Corps of Engineers to provide a permit for the discharge of fill. However, State assumption of the 404 program requires compliance with EPA's regulations including a different definition of fill material. As we are seeing, there may be unauthorized discharges. That may be a part of the problem. And until it is clear to the regulated community, Senator, from both sides there is going to be ambiguity.

Senator CHAFEE. What do you suppose we should be thinking about sitting up here? We are trying to save these wetlands and here you, the Environmental Protection Agency, and the corps shuffle these things back and forth, and meanwhile nothing happens. Do you think you are fulfilling your responsibilities? Not you personally, but your agency.

Ms. COOPER. In instances where discharges are found, where fills are taking place that are not authorized by permit, our regional people do take action. They do attempt to resolve those issues and stop the process where they can. It is not a matter of inaction.

Senator CHAFEE. Well, 120 tons a day seems to me like a pretty good fill.

Ms. COOPER. As I stated earlier, EPA now is working with that company to find an acceptable disposal site for that spoil.

Senator CHAFEE. Meanwhile, are they still doing it?

Ms. COOPER. They are not filling right now but disposing of this material at an upland site. We are working with them to find acceptable sites for continued proper disposal.

Mr. DAWSON. Mr. Chairman, if I might, I think it is not usual for an agency to seek resolution, and we are certainly going to continue to seek our own resolution, but I think this is an example where the Congress could certainly clarify the issue quickly.

Senator CHAFEE. We could clarify it?

Mr. DAWSON. Yes, sir, if you chose to do so. That is not going to abate our efforts to resolve the issue.

Senator CHAFEE. Now wait a minute. If we are going to have to step in, there is such a thing as micro management. We are being accused of that all the time. And if you are going to shuffle everything up here to us, to Settle all of these problems, there is no point in having you on the job, is there?

Mr. DAWSON. This is the only item all morning that I have suggested this might be appropriate. The reason I mention it now is that it has gone on for so long and there are lawyers on both sides of the issue who argue until they are blue in the face.

Senator CHAFEE. It is going on because you folks won't settle it. That is why it is going on.

Now let me just briefly talk about the prenotification of discharges in wetland areas between 1 and 10 acres. It seems to me we have a problem here. As I understand it, you are supposed to receive prenotification of discharges into wetland areas. Isn't that correct? If somebody is going to discharge in a wetland area, they are going to let you know; is that right?

Mr. DAWSON. Between 1 and 10 acres, yes, sir. Anything over 10 they have to seek a permit for.

Senator CHAFEE. Does everybody know about this out there in the hinterlands?

Let me just give you an illustration. Last year I had the privilege, particularly in connection with wetlands, of going up to South Dakota and seeing these prairie potholes all over the place. They are a valuable water resource. They are being filled in in many instances.

Do the people up there know? Do you get the word out to them they have to give you a prenotification before they discharge in there?

Mr. DAWSON. Well, I certainly hope so, Senator. We have been making an effort on that. I wouldn't say it has been perfect. We could certainly look at any instances where that is not occurring. But I know the corps has made a good faith effort.

Senator CHAFEE. If you could give me some illustrations. I know you have been sending out these things. You have a public relations campaign of some type—you mentioned on page 20 of your statement last time—to spread the good news about regulatory reform. That characterization of good news is your characterization, not mine. You are going around telling people about these regulatory reforms. Why don't you tell them about the predischarge notification, too?

Mr. DAWSON. I agree.

Senator CHAFEE. You said you are making an attempt. If you have some illustrations on how you are making that attempt, if you could submit it to me, I would be interested.

Mr. DAWSON. Very good.

Senator CHAFEE. Thank you.

[The information requested follows:]

The requirement for predischarge notification was published in the Federal Register on October 5, 1984. At the same time, each district and operating division published public notices which described changes to the nationwide permits, including the predischarge notification procedures. Approximately 40,000 public notices were distributed nationwide to various agencies, citizens, interest groups, and newspapers. Based on the number of predischarge notifications received, and the number of written or telephone inquires on the subject, it appears the effort was successful.

Senator CHAFEE. My time is up. Senator Lautenberg?

Senator LAUTENBERG. Ms. Cooper, I just wanted to continue something that I had asked before. I plead the indulgence of the chairman because I think that Westway demonstrates some of the problems in the 404 permitting process, and is, in my view, a critical example of that.

Now, Ms. Cooper, when the division engineer—I said this before; I just want to restate so it is clear—sat down to decide if the permit should be issued, he had before him a negative recommendation from each of the agencies represented here. All three agencies reversed the position here that had been taken in the regional offices.

Just as it affects EPA, do you have any idea what accounted for the turnaround in your office? Dagget I guess was the regional person. He had recommended against it. What happened in your office that said OK, we will make that decision; we won't go to the Council on Environmental Quality? Why that change?

Ms. COOPER. The recommendation of the regional administrator was not accepted at headquarters rather than that the decision was changed. The reason for that nonacceptance was simply that a referral to CEQ would very likely not have generated any new information with regard to the Westway situation and the impacts on striped bass. In my view, the CEQ referral would not have given us any new information.

Senator LAUTENBERG. Then the administrator could have vetoed the permit, could he not?

Ms. COOPER. He could have, using the 404(c) veto. I assume that is what you are referring to.

Senator LAUTENBERG. Yes.

Ms. COOPER. I think in view of the significant uncertainties with regard to the data, the real significance and likelihood of the impacts, and whether mitigation would work, the 404(c) veto was not used. We based our decision on the uncertainties within the data, the futility of going forward for more review on the existing data, and the delays inherent in the long-term studies which would have been required in the 404(a) process.

Senator LAUTENBERG. You just used the phrase, the uncertainty of the impact. That is a rather significant statement because Mr. Gordon's organization is predicting permanent damage, certainly matters of great concern, and what you are saying is well, OK, even if it is bleak out there, perhaps it is not as bleak as they say, so we will take the chance. I am surprised, honestly, as you know very well, and we had some discussions, that they didn't say "Well, listen, we have to hold this thing up and force a mitigation plan or that is satisfying."

That has not been done. That is certainly not included in the corps permit. It was recommended we keep an eye on this thing. But the mitigation thing was never required in order for the permit to become operative.

Ms. COOPER. I think EPA put the same conditions in our letter to the corps, asking for a further study, an 18-month study to give us better information, as well as the establishment of a mitigation panel to really lay out both on-site and off-site mitigation that would address the concerns that had been raised.

In our view, the Federal process for this decision, after 10 years has still not placed us at a point of total certainty. Therefore, the decision to try to condition the permit and allow the Federal decision process to come to closure made sense to us in terms of the kinds of resources that we are spending looking at the project, looking at the problems and assessing the impacts.

Allowing the courts to make a determination is probably the most efficient approach in terms of getting a final decision now. At each juncture on the Westway decision we seemingly reached closure and the process continued. So we are hopeful at this point that we will see some ultimate resolution, and perhaps a conditioning of the permit, if the project is to go forward.

Senator **Lautenberg**. You were at, I assume, the meetings between EPA and the other agencies, the White House, congressional offices. You followed that fairly closely.

Ms. **Cooper**. Yes.

Senator **Lautenberg**. Were there meetings or some contact from the White House to discuss the agency's reaction—I raised this question, with Mr. Thomas—your agency's reaction to Colonel Griffith's decision to issue the decision?

Ms. **Cooper**. We received phone calls asking what was going on, what the status of the decision was where we were in the process, and where the other agencies were. But, that was the extent of the conversations, finding out what was going on.

Senator **Lautenberg**. So there was an obvious interest.

Ms. **Cooper**. There was interest, yes, sir.

Senator **Lautenberg**. No recommendations, such as "Look, this thing has dragged on long enough. We have been up and down the river," to use the expression on this, "and let's close it out and get on with it." Did that kind of recommendation come?

Ms. **Cooper**. Not to my knowledge, no, sir.

Senator **Lautenberg**. But you don't know it did not happen.

Ms. **Cooper**. I don't believe it happened. I think I would have been privy to that kind of information. And I was very involved when the decision came to headquarters for resolution. I did talk with people at the White House, but it was more of an information exchange than anything else.

Senator **Lautenberg**. They were interested in moving the decision along. I mean the inquiries on individual decisions of this type. Is that usual coming from the White House?

Ms. **Cooper**. I deal with the White House on quite a number of issues because my operation is external affairs. I maintain liaison with the White House, OMB, other Federal agencies. In my job I get such calls quite frequently.

Senator **Lautenberg**. Thank you, Mr. Chairman. Thank you for your indulgence.

Ms. Cooper, could you submit for the record a list of the meetings that took place on this subject?

Ms. **Cooper**. Absolutely. Yes, sir. I would be glad to. We have been asked by litigants in this case to provide all of our agency documents under the Freedom of Information Act and we have done so. So I would be glad to submit that information to you.

Senator **Lautenberg**. Thank you.

[The information requested follows:]

Litigation is currently underway regarding the 404 permit issued for Westway. Under the Freedom of Information Act, EPA provided litigants a massive volume of documents, including letters, memoranda, technical assessments and meeting reports. These documents are available for your review upon request.

The specific information requested dealt with meetings with White House personnel regarding EPA's position on Westway. No such meetings took place. There were phone conversations with White House personnel regarding the status of EPA's decisions. No other conversations occurred.

Senator **Chafee**. Thank you, Senator.

Ms. Cooper, EPA has the ultimate authority to determine what is a wetland, don't they?

Ms. **Cooper**. Yes, sir.

Senator CHAFEE. My question is why haven't you taken the lead in doing that?

Ms. Cooper. Well, I think there are several distinct issues that can be identified. One is the discussion you were holding earlier regarding the extent of jurisdiction. The other is one of deciding who makes those determinations. We do have the authority, as you said, to determine the extent of jurisdiction. However, because the corps actually issues the 404 permits, it is administratively preferable for the corps to make the routine jurisdictional calls.

Senator CHAFEE. Wait a minute. Say that slowly.

Ms. COOPER. Because the corps actually issues the permits——

Senator CHAFEE. That is right.

Ms. COOPER [continuing]. It is simpler for the corps, with input from EPA, and sometimes with our people in the field together to make many of those jurisdictional calls. In order to make clear who will make those calls, EPA and the corps have a memorandum of agreement which, describes with regard to jurisdiction, how we will make those decisions and who will make them.

Senator CHAFEE. Let's just take an example. Just let's take one from the air. Let's take the Tensas one down in Louisiana.

Now, my records show that this was a perfect example of bottomland hardwoods. The Chicago Mill and Lumber asked for a wetland determination for 110,000 acres. That is a pretty good size of a piece of property. Fish and Wildlife provided EPA with a wetland determination that 105,000 of the 110,000 acres were wetlands. EPA used this finding for the wetland determination down there. Then EPA suddenly backed off and vacated that determination, turned it over to the corps, and the corps, through some system—and I will ask Mr. Dawson how they ever reached their determination—but they reached a determination that not 105,000 of it was wetlands but 11,000, or 10 percent, of it was wetlands.

Now, as you can tell by my questions here, I am not too happy with the corps, but I must say I am not too happy with EPA. If you have the power, why do you back out of that? Why do you give up the authority you have to determine what is a wetland?

Ms. COOPER. Senator Chafee, I believe that case, the situation you described, occurred in 1981; is that correct?

Senator CHAFEE. Well, the determination was made in 1981 by the corps that these were bottomland hardwood wetlands. But in May 1983 my records show you backed off of that and turned it over to the corps and let them make the decision. Now, I just can't understand why you did that. Why did you do that?

Ms. COOPER. I can't tell you. I will be glad to submit that for the record. I believe our Regional Administrator in Region VI was the official who made that determination.

[The following information was subsequently supplied:]

In the Chicago Mill and Lumber Company project in Northeast Louisiana wetlands in the Tensas Basin EPA vacated its jurisdictional determination.

(1) Why did EPA change its original wetland call?

(2) Why did EPA defer the jurisdictional interpretation in this case to the Corps?

Answer: (1) In 1981 the Environmental Protection Agency's (EPA) Region VI office made a jurisdictional determination on a large tract of land in the Tensas Basin owned by the Chicago Mill and Lumber Company. The tract is approximately 110,000 acres and 102,000 acres were originally classified as wetlands and waters of the United States, subject to 404 jurisdiction. The applicant's contractor submitted additional data on the hydrology, soils and vegetative cover of the tract. Upon reviewing the additional data, Region VI concluded that the original delineation of wetlands was too broad and vacated their original determination in a letter dated May 18, 1983 to the Corps Vicksburg District.

(2) The State of Louisiana and the U.S. Fish and Wildlife Service purchased 70,000 acres of the original 110,000 acres of land, therefore, no wetland determination on the entire tract was necessary. A subsequent wetland determination on the remaining 40,000 acres in which Region VI participated, delineated on a broadscale 16,000 acres as wetlands and waters of the U.S. subject to regulatory jurisdiction. No 404 permit applications have been submitted for this area. Region VI continues to participate in wetland determinations, as necessary, to refine the jurisdictional boundary line within smaller and more specific units as individual projects are proposed within the 40,000 acres.

Senator CHAFEE. Let's just take the general philosophy of it. Are you espousing a theory here that since the corps is going to issue the permits, that they should be the ones to do the definition of what is a wetland?

Ms. COOPER. The way we work in the field, Senator Chafee—and EPA region VI is a good example—in many cases both region VI, EPA staff, the corps staff, and in some cases Fish and Wildlife staff go to the field together, survey the situation, and attempt to make the jurisdictional calls of what is a wetland and what is not. We consider bottomland hardwoods a special case. EPA does maintain the jurisdiction for making those calls. But, as a matter of operation, the corps does make most of those decisions with input from EPA and the other agencies.

Senator CHAFEE. I don't get it. Why do they do that? Why do they make most of the decisions?

Ms. COOPER. As I said earlier, both administratively and from a resource standpoint, EPA does not have the depth of field staff that the Corps of Engineers does. Most of our regional offices do not have more than half a dozen people who work on the 404 issue. Nationwide, the corps has over 10 times the staff EPA has in this program.

Senator CHAFEE. If this is a typical case, and I hate to think it is, Mr. Potter's people went out there and made the determination. They were the ones who helped you out.

What do you know about this, Mr. Potter?

Mr. POTTER. Senator Chafee, if you would, please, I am afraid I did not hear the question.

Senator CHAFEE. The question was about the Tensas area. You folks went out and made a determination that out of the 110,000 acres, 105,000 of it was bottomland hardwoods, wetlands. You seem to have reached the decision. Then what happened?

Mr. POTTER. We had made that recommendation, based upon our definition, which is different than the definition that is used by the corps and in some cases different than the definition that is used by EPA.

The problem, from our standpoint, is one of consistency. I think in the Mississippi Valley, and the lower Mississippi Valley in particular, that there is disagreement between the various regions of the corps and the EPA as to how they define wetlands. This lack of consistency has caused definition problems in the past.

Possibly an example that might be better illustrated——

Senator CHAFEE. No, I like this one. Let's stick with this one.

So you came up with a definition, and there certainly was a difference. You come up with about 90 percent of it is wetlands and the corps says 10 percent of it is.

I tell you, I have some pictures here. Then, of course, the clearing goes ahead; 15,000 acres of bottomland hardwoods have been cleared. If that is the way we are treating wetlands in this country, and I can show you pictures here of what they looked like.

What do you know about this, Mr. Dawson?

Mr. **Dawson**. Mr. Chairman, I don't know the details of that particular decision. I can certainly look into it and provide a reaction for the record.

Senator **Chafee**. It won't be necessary for the record because we are going to ask you folks to come back here 1 month from now. We are just working out a date. It will probably be on a Monday. We are just going to stick with this until we get these matters settled, both the MOA's and get this program doing something. So there won't be anything required for the record that you have to submit, except I did ask you if you would be good enough to send me some of the material you have put out alerting people to the prenotification. But about 1 month from now, again on a Monday, we will have you all back. I think you and Ms. Cooper will be the principals anyway. We are just going to stick with this. At that time you can be ready to tell us about the Tensas. That would be helpful.

Ms. **Cooper**. Yes, Senator.

Senator **Chafee**. Now, let's talk about enforcement a little bit. We get, as I understand it, these after-the-fact permits. Somebody goes ahead and illegally fills and then they ask for a permit and they get an after-the-fact permit. Do you know much about this, Mr. Dawson?

Mr. **Dawson**. I certainly know about the general topic, Mr. Chairman, and I would be glad to address it.

Senator **Chafee**. Why don't you tell us a little bit about it.

Mr. **Dawson**. All right, sir. We are not at all satisfied with the enforcement, all of the aspects of enforcement of this program. It concerns me and concerns many people in the corps when situations arise, as they do from time to time, where it is almost to the best benefit of an individual to not comply with the regulatory requirements up front but to wait and take a chance on an after-the-fact permit.

Because of our concerns over this, we have met with the Justice Department and received some good feedback from the Justice Department indicating that they will work with us to try to improve the enforcement. I think it is very important that the corps' regulatory program be credible with the regulated public, and to do that we have to have a predictable and regular enforcement program.

I think we are doing a good job in some areas but other areas not. And, as a general matter, I would just say to you we are not completely satisfied here and hope to and intend to bring about some definite improvements.

Senator **Chafee**. You know that in the water legislation, the clean water bill, which we might take up this afternoon, or we certainly hope to take up this week, we give EPA the authority to enforce these penalties. You are familiar with that.

Mr. DAWSON. I am, yes, sir.

Senator CHAFEE. Originally it was to go to you, too, but that was deleted at your request.

Mr. DAWSON. Well, the actual situation there, Senator, as far as our request, we do not feel that any administrative fine authority is wise at this point. We feel the first step should be or that the preferred course of action would be to beef up our prosecution and enforcement steps rather than having EPA or the Army at this stage of the game—we may have to come around to that—going around levying administrative fines.

Senator CHAFEE. I personally feel we want to go ahead with it, and we will make every effort to go ahead with it. As is indicated here this morning, Mr. Dawson, I feel this program is in a shambles. I really do. I think that the wetlands are just being filled in practically at will. People are not being punished. There are jurisdictional arguments between you and EPA. I just think great damage is coming to our Nation and the environment of the country.

There isn't anybody who doesn't agree on the importance of wetlands. That is sort of like prayer or motherhood. That is good. Everybody says it. But whenever there is a conflict between so-called development and saving wetlands, the development always wins.

Now let's talk a little bit about mitigation.

Mr. DAWSON. Mr. Chairman, could I respond briefly?

Senator CHAFEE. Sure.

Mr. DAWSON. I think your statement is a very serious one when you indicate a belief and a concern that the program is in a shambles. I feel that I must say that I don't agree with that. I don't say the program is perfect. But we have 800 to 1,000 public servants out there that are doing a very good job, in my judgment, with a very difficult task of balancing all of these concerns that run very deeply on both sides, the environmental and developmental side.

I think you expressed some very pertinent concerns that we must address, but I don't believe that there is any evidence that—and I think that supports the need for further hearings—that the program is in a shambles. I believe it is working and we are doing the job the Congress has asked us to do.

Ms. COOPER. Senator Chafee, I would also like to make a similar statement. During the 2 years I have been at EPA, I think we have seen a significant shift in the 404 program. We have put together an overall agency strategy. We are going to work on the advanced designation issue, setting up areas where we will say ahead of time this area is significant and it is not an area that would be available for filling. We have research going on to answer some of the scientific questions especially relating to the bottomland hardwoods areas. And, we are putting together a much better program, basing it on the resources we have and very strong concerns that you share, that I share, that I think Bill Ruckelshaus and Lee Thomas share.

Across the country, there are problems and there are difficulties, but I do think the program is working better than your impression would indicate.

Senator CHAFEE. That may be. But here is Mr. Arnett. No one, as I indicated earlier, will ever accuse Mr. Arnett of being a wild-eyed kook on the environment. He got to the point of utter frustration. Mr. Dawson indicated no further need for hearings. These are oversight hearings. We want to see where you are coming from on these MOA's.

Mr. DAWSON. No; I meant to say I agree there is a need to try to convince you we are trying to do a better job.

Senator CHAFEE. I am not having hearings just to have people come up here and badger people and spend time. But nothing is happening on these MOA's. This has gone on for a long time. And, Ms. Cooper, you can't seem to get a definition out of your folks as to what is a wetland. Boy, if you don't have that, we have a long way to go.

Ms. COOPER. Left to our own devices, we would define it very quickly, but we have to work with the other primary agency in this program and we just have to get our act together, Senator Chafee.

Senator CHAFEE. Well, that is right. I won't argue with that.

Ms. COOPER. The difficulties we have discussed generally involve process and procedure. However, the data we have gathered from the field shows an increase in regulatory activity both on our part and the Corps' part. I really believe the story is not as bleak as you paint it.

Senator CHAFEE. Let me just ask you a question. I am just curious about this. I wonder if the corps in the last 2 years, has denied a permit to dredge or fill bottomland hardwood.

Mr. DAWSON. Yes, sir. I can cite at least 13. And I think, Mr. Chairman, the impact on the regulated public of the changes that we have made has been something that ought to be mentioned. I think the thousands of people that have to get a permit each year from the corps are getting a more predictable, better response. They are getting more permits denied now nationwide than before regulatory reform. But I think they like it better because the answers come quicker. It is more predictable, much less uncertainty. And I would submit for your consideration that that is a side of this that also ought to receive some interest and scrutiny.

Senator CHAFEE. What do you say to that, Mr. Potter?

Mr. POTTER. I think that we have a much better handle perhaps, Mr. Chairman, on the resource problems than we did in the past. I think that Bob's side of the coin is just the permit processing side of the coin, and I think that is going better.

We are seeing, however, some serious problems and we are seeing some uncertainty in some areas that you have mentioned. We are not involved in all of these issues, but we certainly have some frustration with the fill versus waste situation, for example, and some of the other directives to the field that are in some cases unclear.

Maybe the bottom line is that the Fish and Wildlife Service role in this process, at this point in time, is uncertain, particularly with regard to mitigation and the relationship between the traditional role that they have in mitigation under the Fish and Wildlife Coordination Act and the roll that they now have under the 404 process.

We have not clarified that relationship. We definitely need to do that. Mitigation is a concept that developed from the Coordination Act. The direction that the corps seems to be going with the 404 process is contrary to the traditional notions in some cases of how mitigation works. That is a fundamental problem we need to resolve.

Senator **Chafee**. Let me just take a specific. Mr. Dawson has rightfully asked us for specifics instead of generalizations, and I think he is entitled to that. I am going to refer to an area project you are familiar with. That is Attleboro Mall in Massachusetts, which is close to my State.

Here is the situation. The company wanted to build a shopping mall which would fill 30 acres of wetlands. The company proposed to mitigate the loss by creating new wetlands. Now this is clearly a project that is not water dependent. In other words, a shopping mall doesn't have to be near water. It is not like a marina. It is not water dependent.

It seems to me that there should be a search for a practical alternative instead of filling some wetlands. And even if there is mitigation, the first thing should be a search for a suitable alternative instead. A suitable alternative was found in this instance and exists.

Now, EPA objected to the original proposition, and Fish and Wildlife did, too. But you chose, Mr. Dawson, to elevate this and to give a decision on it just recently. I find that I just don't understand that.

Mr. **Dawson**. Mr. Chairman, if I could correct the record on that, it was not my decision either to call the matter forward, nor did I call it to my office to make the decision I think what you are referring to is Gen. John Wall's, the Director of Civil Works, decision to bring it forward to his desk here in Washington.

Senator **Chafee**. You are right. How does it get up to him without going through the district? How does it get up to him?

Mr. **Dawson**. Well, the division, in this case which equates to a district, the New England Division, all he has to do is ask that the matter be brought forward for his review, which I believe is what occurred in this case.

Senator **Chafee**. Is that common?

Mr. **Dawson**. No, sir, it is not common.

Senator **Chafee**. I mean, for instance, did he bring up the Westway one?

Mr. **Dawson**. No.

Senator **Chafee**. So he didn't bring up Westway and brought up a little thing from Attleboro. Isn't that unusual?

Mr. **Dawson**. Well, it is not a common occurrence, Mr. Chairman, but I think we could supply you for the record the details. I think General Wall should have that opportunity of indicating why this case was of sufficient importance in his judgment to bring it forward.

Senator **Chafee**. Well, it certainly is unusual, as I read it. In other words, they are setting a new precedent when General Wall says if there is mitigation, that is all right. He says, reading, "If you have a hundred percent mitigation, that is pretty good. Admittedly, this possible reading," and he cites section 40 CFR 230, "is somewhat problematic because if not implemented carefully, it could serve to weaken and subvert key positions of the current 404(b) guidelines."

That latter provision creates a rebuttable presumption that practical alternatives exist for non-water-dependent activities, thereby discouraging issuance of permits for such activities. In other words, he notes that he is just going to mitigation rather than the alternative site, even though it is not water dependent.

Can you give any explanation why that would be so, why he is doing this?

Mr. DAWSON. Well, sir, the only thing I would point out is that I don't think there is a logical inconsistency there because if he determined or the division engineer determined that there was no practicable alternative site, then the mitigation approach would come into play. Whether that is exactly what occurred here I am not certain, but that very well may be the sequence.

Senator CHAFEE. In this case, there was an alternative 3 miles away.

Mr. DAWSON. There was a practicable alternative?

Senator CHAFEE. Right. And he talks about that. Yet the decision was to go ahead and fill the wetland, give them the OK. Indeed, it was the corps consultant that found the alternative.

But I am just mystified in the whole case. I just can't understand. Earlier we had this great concern, valid concern, of Senator Lautenberg about Westway. That wasn't significant enough. Here is this monstrous project to be elevated, and General Wall elevates this little project down there in Attleboro that sets a new precedent.

It seems to me we are getting off on a whole new dangerous road here. And I don't know how people mitigate wetlands. Are you familiar with that?

Mr. DAWSON. To some extent. I am not an engineer.

Senator CHAFEE. If there is a way to mitigate, create a new wetland, I don't know how it is done.

Mr. DAWSON. There are experts who say there is. I, like you, am not familiar with the way it is done.

Senator CHAFEE. What do you say about that, Mr. Potter?

Mr. POTTER. We funded an experiment in wetland restoration last year in Chicago. We tried to get the corps to pay for it, but they would not.

Senator CHAFEE. I missed that. What did you say?

Mr. POTTER. I said that we funded a project in Chicago, in Des Plaines actually, to restore wetlands. It was the first of its kind.

Senator CHAFEE. That was mitigation, wasn't it?

Mr. POTTER. Yes. This is a fairly new business.

Senator CHAFEE. What did you do? Did you make a wetland?

Mr. POTTER. They are restoring an area that was formerly a wetland area that has been subsequently developed.

Senator CHAFEE. What do you say about that, Mr. Gordon?

Mr. GORDON. Technically it is being done, sir. We feel that this is a concept that is coming of age and ought to be looked upon on a case-by-case basis. Where there is no other alternative, then mitigation perhaps has a role to play in restoring, enhancing, what man on Mother Nature has destroyed.

Senator CHAFEE. Here we have an alternative, that is acknowledged, in this particular instance. I just wanted to voice to you my concern, Mr. Dawson and Ms. Cooper, about this business of disregarding alternatives and going to so-called mitigation when there is no water-related demand.

It is interesting to hear that you are doing experimental work with developing mitigation, and Mr. Gordon seems to think there is some prospect in it. But I can't believe it is not very expensive. And I can't believe that it produces what the original does. So I just hope that you are not setting a precedent in this particular case.

Ms. COOPER. Senator Chafee, at this point in time, whether that project will go forward or not is yet to be decided. EPA's region 1 has taken the position all along that this permit should be denied. What their final action or final recommendation will be, we do not know.

Senator CHAFEE. All you can do is bring it up and veto. Isn't that your only recourse now?

Ms. COOPER. Yes; we can veto it.

Senator CHAFEE. I mean the Corps of Engineers chose to overlook what the EPA's region 1 administrator says.

Ms. COOPER. EPA is now awaiting the corps' final decision. It is not clear yet what our next step will be.

Senator CHAFEE. I am not referring to this project specifically, but I would certainly like EPA to be bolder than they have in the past. I must say EPA seems to be very timid lately in these areas.

Ms. COOPER. Over the last 2½ years, we have initiated eight 404(c) actions.

Senator CHAFEE. You mean vetoes?

Ms. COOPER. Yes, sir.

Senator CHAFEE. That you have exercised?

Ms. COOPER. We have begun that process on eight.

Senator CHAFEE. There is a difference between exercising it and being in the process, isn't there, Ms. Cooper? You have actually used the veto how many times?

Ms. COOPER. Since 1982 we have completed the process twice, once in Alabama and once in South Carolina. Those two are final actions. We have 404(c) actions currently pending on five other projects. The 404(c) process is a fairly lengthy one. The region has to go through a public hearing, review the hearing record and submit a recommendation to the assistant administrator who reviews the record and, after consultation with the applicant, makes a final determination.

Senator CHAFEE. Good. Well, go to it.

Thank you very much for coming here. We will notify you you as soon as possible. I don't think it will be necessary for you to be here, Mr. Gordon, but Mr. Potter and Ms. Cooper and Mr. Dawson. We are looking at the 15th of July and there are some problems, but we will get back to you, because obviously you want to set your own schedules. We will let you know as soon as possible. It might be on a Friday.

The problem is both Senator Mitchell and I are on the Finance Committee. The Finance Committee is conducting 30 hearings on the President's tax reform. That will take Tuesdays, Wednesdays, and Thursdays every day of every week starting next week. So we are trying to search for a day. It can only be on a Monday or Friday. So we will let you know as promptly as we can.

Thank you for coming. That will conclude this hearing. Thank you all.

[Whereupon, at 1:15 p.m., the subcommittee was recessed, to reconvene subject to the call of the Chair.]

[Responses from EPA to additional questions from Senators Bentsen and Moynihan, and a letter from Senators Mitchell and Baucus to Senator Goldwater follow:]

Question from Senator Bentsen:

Question:

The Presidential Task Force directed that section 404(b)(1) guidelines be reviewed. What is the status of that action?

Answer: In the summer of 1983, following in-depth review by EPA of the 404(b)(1) Guidelines, Administrator Ruckelshaus determines that there was inadequate documentation of problems or delays caused by the Guidelines to justify their revision. If and when such documentation is presented to EPA, review of the Guidelines will be reopened.

Question from Senator Moynihan:

Question 1.:

The Corps of Engineers conducted a new study of the striped bass in the Hudson River during the winter of 1983-1984. Would an additional winter of study have yielded significantly more knowledge on the abundance and behavior of striped bass in the Westway area and on the potential effects of Westway?

Answer: There are a number of different theories about how the juvenile striped bass use the project area for migratory and overwintering habitat. EPA continues to believe at this time that none of the theories are sufficiently supported by available data to provide a dependable explanation of striped bass utilization of the Westway site. Each of the theories assigns Westway a different degree of importance to the striped bass fishery. There were two major questions to be answered in assessing Westway impacts on the striped bass fishery in the Hudson River. First, how many juvenile striped bass would be displaced if the Westway landfill were constructed and, second, would displacement result in the death of the fish? Given the state of the art of our science, EPA believes that an additional year of study may not have conclusively answered the second question; however, it would have materially advanced our understanding of striped bass utilization of the site and hence the impacts of displacement.

Question from Senator Moynihan:

Question 2.:

Is the existing knowledge of fisheries in the Hudson sufficient for a decision on the 404 permit for Westway? Are there examples of 404 permits that have been granted with a similar degree of uncertainty?

Answer: In order to decide to issue a Section 404 permit, the Corps of Engineers must be able to conclude, among other things, that the proposed project will not result in significant degradation to the aquatic environment. If the Corps lacks sufficient information to make a reasonable judgment as to whether there will be significant degradation, the Section 404(b)(1) Guidelines require that the permit be denied (unless the navigational override applies). As explained in Mr. Daggett's letter of January 21, 1985, to Colonel Griffis and Mr. Taylor, EPA determined that the information in the FSEIS is insufficient to demonstrate that Westway will not have a significant adverse effect on the striped bass and, indeed, that what information there is at present suggests that such effects are possible. Based on its January 24, 1985 Record of Decision, the Corps obviously feels differently, i.e., that it did have sufficient information to conclude that Westway would not result in significant degradation. The reasonableness of this Corps conclusion is one of the issues currently being litigated in the United States District Court for the Southern District of New York.

In response to the second part of your question, one example is a permit for an oil and gas processing facility on the North Slope of Alaska. EPA's Region X office in Seattle, Washington has just completed negotiations with ARCO Alaska, Inc. which resulted in new conditions being attached to the Corps 404 permit for the project. In this case there is considerable uncertainty regarding the degree of impact of the noise from the facility on waterfowl usage of adjacent wetland areas. The permit conditions provide for monitoring waterfowl utilization in the vicinity of the facility and the subsequent response of waterfowl after it is operational. If it is determined that waterfowl use of the adjacent wetland areas is adversely affected, mitigation is required. In this case, EPA felt strongly that the monitoring program would reveal the nature and degree of noise impacts from the facility and that the prospects for achieving successful mitigation were high (better than those on Westway).

Question from Senator Moynihan:

Question 3.:

What special conditions are included in the 404 permit for Westway?

Answer: With respect to the striped bass impacts, the Corps New York District attached a special permit condition that requires the permittee to develop a preliminary onsite fisheries mitigation plan to be implemented during the construction of Westway. The special condition also requires the formation of an advisory group to be comprised of representatives of EPA, U.S. Fish and Wildlife Service, the U.S. National Marine Fisheries Service, the New York State Department of Environmental Conservation, the New Jersey Department of Environmental Protection, the Corps of Engineers and two independent fisheries experts. The advisory group's purpose is to develop a final on onsite mitigation plan and recommend offsite mitigation plans, with the Corps making final determinations if the permittee and the advisory group disagree. EPA feels that this condition satisfies the intent of the two conditions recommended by Josephine Cooper in her letter to the Acting Assistant Secretary of the Army for Civil Works (ASACW) which requested completion of the originally contemplated 18 month habitat study and the use of the Mitigation Panel to more fully explore approaches to mitigation coupled with a requirement to install whatever practicable methods that result.

Question from Senator Moynihan:

Question 4.:

What measures could be taken to mitigate any potential effects of Westway on fisheries? Would it be necesary to restrict development along the New Jersey waterfront to mitigate the potential effects of Westway?

Answer: The Westway Mitigation Plan developed by the New York State Department of Transportation proposed to re-create moderate depth reduced velocity basins to mitigate the loss of the Westway project site. EPA feels that this approach is too simplistic and that a habitat characterization study is required to identify the chemical, biological and physical attributes of the Westway project area prior to designing a mitigation plan. This is why we recommended to the Assistant Secretary of the Army completion of the originally contemplated 18 month habitat study and the use of the Mitigation Panel to more fully explore approaches to mitigation and to require installation of whatever practicable methods that result. EPA does not feel that sufficient information currently exists to directly address the restriction of development along the New Jersey waterfront; however, future 404 permit applications will certainly be evaluated based upon cumulative impacts to fisheries resources that can reasonably be predicted at that time.

Question from Senator Moynihan:

Question 5.:

Why did the Administrator of the EPA decide not to request a referral of the permit decision to the CEQ, request an elevation of the decision to higher levels of the Corps, or veto the permit under Section 404(c) of the Clean Water Act?

Answer: Referral of the EIS to CEQ was recommended to the Administrator by Regional Administrator Daggett. Assistant Administrator for External Affairs, Josephine S. Cooper, after reviewing the Corps of Engineers' Record of Decision and EPA's earlier comments, and considering the broader issues and the likely consequences of additional Federal review of the permit decision, recommended to the Administrator that the EIS not be referred to CEQ. CEQ referral was likely to consist either of further consideration of the same information and arguments which were before the Corps, or a review requiring an extensive new round of fish studies. If CEQ based its review on existing information, it is unlikely that it would result in any new insights which have not already been presented to the Corps by EPA, the Fish and Wildlife Service, or the National Marine Fisheries Service. Since CEQ's recommendations are not binding, it does not appear that such a review would add anything substantively new to the decisionmaking process. It does appear, however, that it would cause additional administrative delay. If CEQ were to propose undertaking an extensive new round of fish studies, there is uncertainty as to the conclusiveness of the outcome. We know that the shallow interpier area to be filled for Westway is used by young-of-the-year and yearling striped bass, but we do not know what characteristics make this habitat so attractive to the young fish. While additional studies of fish usage and habitat characterization would undoubtedly be helpful, at this stage such studies would lead to substantial additional delay and it is not certain that they would produce conclusive results. In arriving at our decision, we balanced the prospects for increasing the level of confidence in prediction of the impacts on the fishery against the liability of substantial additional delay in the Federal review process. We have now spent over ten years reviewing the potential environmental effects of Westway. This is too long. Therefore, we feel that EPA's appropriate course of action is to allow Federal agency decisionmaking on Westway to come to final closure.

Requesting elevation of this decision to the Assistant Secretary of the Army would put the official reviewing this decision in a situation similar to CEQ's if EPA had referred the EIS. Additional review without new data is unlikely to add anything new to the decisionmaking process, and would cause administrative delay. A new round of fish studies by the reviewing official has the same consequences as they would if done by CEQ.

Answer to Question 5. cont.:

Therefore, we decided not to request 404(q) elevation. However, accordance with Mr. Daggett's recommendation we did request the Acting Assistant Secretary of the Army to place conditions on the permit. These are:

° Completion, concurrent with the project's initiation, of the full 18-month habitat study originally contemplated by the Corps.

° Use of the proposed Mitigation Panel to more fully explore the prospects for effective mitigation and adequate monitoring, on and off site, coupled with a requirement to install whatever practicable methods result.

EPA does have the authority under Section 404(c) to prohibit or restrict the specification of a site for discharge of dredged and fill material when we determine there will be an unacceptable adverse impact on fish, wildlife, water supply or recreation. Mr. Daggett recommended denial of the 404 permit in this case in large part because the state of the data makes it impossible to provide reasonable assurances that significant degradation will not occur. The decision whether to initiate a 404(c) proceeding is difficult in such cases. Final action under 404(c) requres a determination that unacceptable adverse effects "would be likely to" occur. While we still believe, as was set out in Mr. Daggett's January 21 letter to Colonel Griffis, that the available evidence indicates that it is quite possible that Westway will result in significant decline of the Hudson River stock of striped bass, we had to make a judgment concerning whether this risk was demonstrable enough to warrant veto. Mr. Daggett, in consultation with Headquarters concluded that the evidence to date was not strong enough to warrant such action in this case. Moreover, there are limitations on how much new and better data could reasonably be expected to be obtained in the near future. We believe a sound 404(c) decisionmaking process on Westway would require an extensive new round of fish studies. Since such studies would take as long under an EPA 404(c) action as a CEQ referral, our decision here was also balancing of the prospects for increasing the level of confidence in prediction of the impacts of the fishery with the substantial additional delay in the Federal review process. And for the same reasons explaining our decision against referral, we decided the appropriate course of action was to allow Federal agency decisionmaking to come to final closure without exercising our discretion to initiate a 404(c) action.

ROBERT T. STAFFORD, VERMONT, CHAIRMAN

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United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510

June 26, 1985

Honorable Barry Goldwater
Chairman, Committee on
Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We are writing to ask that you postpone consideration of the nomination of Mr. Robert K. Dawson to be Assistant Secretary of the Army for Civil Works until after July 15, 1985. On that day the Senate Committee on Environment and Public Works will conduct an oversight hearing on section 404 of the Clean Water Act, one of the key responsibilities of the Assistant Secretary for Civil Works.

The "404 program" regulates the discharge of dredged or fill material into wetlands and other waters of the United States. The Committee on Environment and Public Works has jurisdiction over this program as well as a number of other Federal laws to conserve our Nation's vital and inreasingly threatened wetlands.

Because of our shared concerns over the rapid elimination of these valuable resources, we believe it is particularly important that the provisions of section 404 be administered fully and effectively. Nearly 60 percent of the original wetlands in the lower 48 states have been destroyed, and the Office of Technology Assessment estimates that this destruction continues at the pace of 300,000 acres per year. Consequently, the Committee on Environment and Public Works is in the process of examining the extent to which the Department of the Army is fulfilling its responsibilities under section 404.

In two previous oversight hearings conducted by the Committee on Environment and Public Works, concerns were raised regarding Mr. Dawson's administration of section 404 as Acting Assistant Secretary of the Army for Civil Works over the past year. A number of questions were raised by Committee members to which answers were not provided. Consequently, a third oversight hearing was scheduled for July 15.

We respectfully ask, therefore, that the Committee on Armed Services allow the Committee on Environment and Public Works to complete its review of Mr. Dawson's stewardship over the section 404 program before proceeding with consideration of his nomination.

Thank you for your cooperation and assistance.

Sincerely yours,

George J. Mitchell
George J. Mitchell

Max Baucus

OVERSIGHT HEARINGS ON SECTION 404 OF THE CLEAN WATER ACT

MONDAY, JULY 15, 1985

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION,
Washington, DC.

The subcommittee met at 1:32 p.m., in room SD-562, Dirksen Senate Office Building, Hon. John H. Chafee (chairman of the subcommittee), presiding.

Present: Senators Chafee and Mitchell.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator **CHAFEE**. Good afternoon. We appreciate the witnesses returning again today. There is a Finance Committee hearing at 2:30, which both Senator Mitchell and I are anxious to attend, so this will be a brisk session.

We have here today, Mr. Sanderson, who has just taken the place of Miss Cooper; and this is your first appearance, and we welcome you here, Mr. Sanderson.

Mr. **SANDERSON**. Thank you.

Senator **CHAFEE**. And, of course, Mr. Dawson, we welcome you back.

Mr. **DAWSON**. Thank you.

Senator **CHAFEE**. Mr. Dawson is the Acting Assistant Secretary of the Army for Civil Works.

Mr. Potter is the Acting Assistant Secretary of the Interior for Fish and Wildlife. The purpose of the hearing is to learn what progress has been made between your agencies in connection with the outstanding issues of the 404 program. These issues, which were identified in the last two hearings, include the memorandum of agreement between the Army, EPA, and Fish and Wildlife, the definition of fill material; the definition of mitigation; interstate commerce and wetlands determinations.

I have asked each of you to report on the progress you have made in resolving these and other issues since the June 10 hearing, which is a little over a month ago.

Mr. Sanderson, I understand you have a statement.

First, we welcome Senator Mitchell, who is the ranking member of this subcommittee, and look forward to any statement you might have.

OPENING STATEMENT OF HON. GEORGE J. MITCHELL, U.S. SENATOR FROM THE STATE OF MAINE

Senator MITCHELL. Thank you, Mr. Chairman.

I welcome the witnesses to this hearing on implementation of the section 404 program. The purpose of this series of hearings is to improve the effectiveness of section 404 in protecting our Nation's vital wetlands resources.

Congress intended the Army Corps of Engineers and the Environmental Protection Agency to administer this regulatory program to protect wetlands and other waters in this country from discharges from dredged or fill materials. However, as I indicated at the last hearing, I am concerned that many of our waters and many filling activities have been excluded improperly from the jurisdiction of section 404.

The corps has failed to ascertain jurisdiction over isolated wetlands. The corps' narrow view of its jurisdiction over such wetlands is, in my view, inconsistent with the law and with some court decisions.

At the hearing on June 10, I asked for a clear statement of the corps' policy on isolated wetlands. I specifically asked where the use of such wetlands by migratory waterfowl is sufficient to establish an interstate commerce for the basis of jurisdiction. I look forward this afternoon to a response on what circumstances are required by the corps before the corps will accept definitions on isolated wetlands and what progress has been made to establish a clear, specific national policy over jurisdiction of these waters.

I note, Mr. Dawson, that you have written to Senator Chafee on July 10 and look forward to exploring that in detail.

Mr. DAWSON. Thank you, sir.

Senator MITCHELL. Similarly, the corps does not regulate discharges that are spills or accidental or primarily to dispose of waste as opposed primarily to fill. The corps has contended that such fill should be regulated by EPA under section 402. EPA maintains, in turn, that such fills should be regulated under section 404.

This dispute has been going on for years. One court deadline was missed, then another. In the meantime, a substantial quantity of filling that is plainly in violation of the law occurs with no consistent or timely enforcement because of disagreement between the two agencies.

In some instances, EPA has taken action against fills that are not authorized by permit, including those that are accidental or intended to to dispose of waste. However, in other situations, the committee has evidence that EPA has failed to take action, taken only partial action, or proceeded at an unacceptably leisurely pace.

For example, in the filling of a Pennsylvania wetland with fly ash, which I cited in the last hearing, EPA did successfully persuade the paper company involved to switch voluntarily to an upland site. Unfortunately, the thousands of tons of waste material deposited in the wetland prior to then remain to this day.

No enforcement action has been taken by anyone to have it removed.

I am not confident, therefore, that a successful interim measure has been put in place to deal with discharges of fill that the corps refuses to regulate under section 404. The implementation of such a mechanism is a topic I intend to explore further this afternoon.

I hope to hear also, along with Senator Chafee, about the results of EPA's efforts to define the nature and extent of problems associated with the disagreement over the definition of fill material.

I want to emphasize that such information has no bearing on the fact that accidental fills or discharges or fills for wastewater disposal purposes must be regulated one way or another under the Clean Water Act.

I look forward to hearing from the witnesses and these and other questions which I and Senator Chafee raised in the previous hearing and intend to reexamine today. I thank all the witnesses for being here.

Thank you, Mr. Chairman.

Senator CHAFEE. Thank you, Senator Mitchell.

Why don't we start with Mr. Sanderson?

Mr. Sanderson, this is your first visit here, and I have your statement. I suspect the other gentlemen don't have lengthy statements, do you?

Mr. DAWSON. No, sir.

Senator CHAFEE. Don't feel compelled to go through this entire statement, Mr. Sanderson. We have only 50 minutes, or so, although we will stay later if need be. Why don't you proceed?

STATEMENTS OF RICHARD E. SANDERSON, ACTING ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS, ENVIRONMENTAL PROTECTION AGENCY; ROBERT DAWSON, ACTING ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS); AND CRAIG POTTER, ACTING ASSISTANT SECRETARY, FISH, WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR

Mr. SANDERSON. Senator, if I may, I have submitted my statement for the record.

Senator CHAFEE. Fine.

Mr. SANDERSON. I would like to summarize it in a 4- or 5-minute statement, if I could.

Senator CHAFEE. Fine.

Mr. SANDERSON. Thank you, and I welcome the opportunity to appear before you today to discuss EPA's environmental section 404 efforts. The subcommittee has requested that EPA provide an explanation of why we vacated our original determination of the wetland boundary line on the Tensas Basin tract in Louisiana last year.

EPA and the Army, in 1980, signed a memorandum of understanding on jurisdiction. Under the MOU, the corps establishes jurisdictional boundaries in response to 404 applications or preapplication inquiries, unless EPA designates a special case and retains the responsibility to establish jurisdiction. Special cases are those situations where significant issues or technical difficulties exist concerning the jurisdictional scope of section 404 waters, the environmental consequences of jurisdiction are significant and EPA has declared a special interest. While the memorandum of understanding on jurisdiction has expired, we continue to follow its procedures until negotiations between EPA and Army produce mutually acceptable revisions. Because the Tensas Basin Tract fell within the special case definition, our region VI office in Dallas made the initial boundary call in 1981.

It determined at that time that 102,000 acres of the 110,000-acre tract were wetlands. Subsequently, the owners of the Tensas Tract questioned the scientific validity of our boundary determinations and provided information to support their contentions. Our regional staff agreed that there were inaccuracies in our 1981 field work and then withdrew the entire boundary determination.

Seventy thousand acres of that tract were subsequently acquired by the U.S. Fish and Wildlife Service and the State of Louisiana. A wetland determination on the remaining 40,000 acres delineated on a broad scale 16,000 acres as a wetland subject to regulatory jurisdiction.

In such bottomland hardwood cases, the vegetation is often facultative, which means it can be found in either wetland or nonwetland circumstances. Because of this, there has been much controversy over how to establish 404 jurisdiction in bottomland hardwoods areas. Therefore, we recognized the need for stronger national guidance on this issue, and we are moving to develop it. We issued interim guidance to our regions late last year and intend to issue final guidelines earlier next year.

The subcommittee also requested information on the status of the efforts to resolve the differences between EPA and corps definitions of fill material. In February 1984, EPA and Army signed a settlement agreement in *National Wildlife Federation* v. *Marsh*, which called for a joint proposal for the definition of fill material by May 1984. EPA and Army entered into discussions, and a joint proposed definition was agreed to at the staff level. However, Mr. Gianelli, then Assistant Secretary of the Army for Civil Works, objected to its adoption. The agencies agreed that a study of the extent and nature of these discharges was needed in order to reach a consensus on a common definition and notified the court that additional time would be required. We will this week complete the collection of EPA's data for the third and final phase of that study.

EPA, however, is committed to working with Army to resolve our differences quickly and to ensure an environmentally effective program to regulate these discharges.

The subcommittee also requested that EPA elaborate upon former Assistant Administrator Cooper's statement that EPA regional offices disagree with the findings of the corps section 404 permitting requirements and specifically asked for examples of such cases. Before I cite those specific examples, I would like to note that it is the minority of cases in which permits are issued over EPA's objections. We consider these disagreements as serious because they often involve issues of interpretation of our environmental standards or matters of precedent that may have significant long-term implications. I will mention a few specific cases which I believe are representative of these kinds of situations. The *Attleboro Mall* case, in Massachusetts which you mentioned last time is a timely example. The project involves a shopping center, part of which is proposed to be located in a 30-acre red maple swamp. Our regional administrator, Michael R. Deland, in Boston, MA, has advised the corps that the fill does not comply with the guidelines because of the availability of a practicable alternative site, identified in the study. Because the applicant for the Attleboro Mall has proposed a plan to mitigate the impacts on the wetland, the corps recently indicated it intends to issue the permit. EPA has serious concerns about the technical feasibility of the applicant's proposed mitigation plan. Our Boston office, under Mr Deland, is now evaluating whether to pursue the case under the section 404(q) memorandum of agreement or under our section 404(c) authority.

A second example is a proposal to redike 900 acres of tidal marshes in South Carolina to form an impoundment for duck hunting. EPA has advised the corps that the project does not comply with the guidelines. The corps decided to issue the permit, and EPA requested elevation of the decision pursuant to the section 404(q) memorandum of agreement.

The Army declined EPA's request, and our region IV staff in Atlanta, GA initiated procedures which led to an EPA decision to restrict the use of the site under section 404(c).

Another matter on which the subcommittee requested information is the EPA memorandum of agreement with the Department of Army under section 404(q). On June 1, 1984, former Administrator Ruckelshaus provided Secretary Marsh of the Department of Army with 6 months' notice of our intent to renegotiate the agreement. The negotiations failed to produce a new agreement within the 6 months, and the 1982 agreement expired. Both Army and EPA agreed to continue to follow the procedures of the expired document. I have met with Mr. Dawson at the Pentagon three times over the past 10 days in attempting to work out the negotiations.

Finally, we have been asked to provide EPA's views on the extent to which nonnavigable isolated interstate waters are subject to jurisdiction under the Clean Water Act. The simple answer is that all such waters are regulated if their use, degradation, or destruction of water could affect interstate or foreign commerce. It would be virtually impossible to delimit all possible circumstances which affect current or interstate foreign commerce. We fear in trying to do so, we might overlook some possibilities and inadvertently narrow jurisdiction.

Nevertheless, I shall provide a description of factors which should be considered in making a determination. We do not consider it to be all inclusive: One: Waters from which fish or shellfish are or could be taken and sold into interstate or foreign commerce; two, waters which are or could be used by interstate or foreign travelers for recreational or other purposes; three, waters which are or could be used for industrial purposes by industries in interstate commerce; four, waters used as habitat by birds protected by the migratory bird treaties; five, waters which are habitat for endangered species; and six, waters used to irrigate crops sold in interstate commerce.

EPA supports application of a rule of reason in applying criteria such as these to the facts of individual cases.

Thank you for the opportunity to briefly summarize my statement, and I will be glad to provide any additional information on these issues.

Senator CHAFEE. Do either of you gentlemen have anything you wish to say, Mr. Dawson or Mr. Potter, as far as opening statements?

Mr. DAWSON. No; thanks.

Mr. POTTER. I think that the record is voluminous, Senator Chafee. We have tried to summarize where we stand. I think that it really boils down to the question of mitigation policy and how it is implemented through the memorandum of agreement.

Senator CHAFEE. Why don't we get right into it? Mr. Potter, how are we doing on the memorandum of agreement between you and the Army?

Mr. POTTER. We have had several sessions. There is an expanding exchange of correspondence that has occurred. Maybe the best thing to do would be to highlight the correspondence. There was a June 26 letter that came to us from the corps which outlined some problems and some potential solutions.

We had five categories of problems before, and it looks as though we have achieved resolution on three of those issues, which we are very pleased about.

Senator CHAFEE. It seems to me it looks like you have got it in place. Last time I think there were suggestions that there was agreement in principle, but I think you will find this subcommittee leery of agreements in principle or that it looks like.

Have you got it nailed down? You had five points; are three of them nailed down?

Mr. POTTER. You would have to ask Mr. Dawson, of course, specifically whether it is nailed down. There is an exchange of correspondence. They have agreed to remove the threat of elevation language in the MOA, that is the requirement to threaten elevation; they have agreed to consider if necessary, at renegotiation the clause that does not allow us to negotiate or to cancel the MOA; and they have also agreed to allow an opportunity to negotiate with the district engineer after he has received our comments but before he has decided to issue the notice of intent.

So those are positive aspects.

Senator CHAFEE. Let's see if you agree with that, Mr. Dawson.

Mr. DAWSON. Mr. Chairman, I do. I think, as Mr. Potter pointed out, we have agreed to all of those things. I think the Army has made a number of concessions here, and I think we are making very good progress when I compare the time that it has taken, and it has certainly taken a lot of time, to the time it took for the 1980 MOA's. The MOA's were about 3 years in the making, and the 1982 version took some 15 months to negotiate. I think we are making some very definite and good headway, and I would agree with Mr. Potter's assessment on those three issues.

Senator CHAFEE. Let's see if I understand which one. As far as the MOA being cancelable by any party, you have agreed to that, right?

Mr. DAWSON. That's correct.

Mr. POTTER. That is correct.

Senator CHAFEE. Eliminating the threat to elevate before a decision by the corps is made. You settled that, didn't you say, Mr. Potter?

Mr. POTTER. That is correct, Mr. Chairman.

Senator CHAFEE. Allowing the corps and the Fish and Wildlife Service to resolve differences before permit is elevated to the Assistant Secretary; you settled that one, right?

Mr. POTTER. That is correct.

Senator CHAFEE. As I understand, the two that are left is the allowance of the permit to be elevated based on the projected impact on the fish and wildlife resources. That is still unresolved?

Mr. POTTER. That is correct.

Senator CHAFEE. And the other one is requiring the corps to review a permit if requested by the Assistant Secretary for Fish and Wildlife?

Mr. POTTER. That is correct.

Senator CHAFEE. Those are the two outstanding?

Mr. POTTER. That is correct.

Senator CHAFEE. How are we doing on those?

Mr. POTTER. Well, we are at—I guess the best way to characterize it would be—an impasse. There has been correspondence from Bob's staff, I think, with Morgan Rees indicating reservations about what they call automatic elevation. I am not sure that I would call it automatic, but they do not agree, or they have expressed some concern. Based on the purpose of the regulatory reform effort I believe that they do not like the idea that we have the opportunity to automatically elevate. I do not think however, that it is automatic. I think that is an incorrect characterization.

But we have an exchange on that issue that is going on. We have some concerns about it. There is a new letter that was just given to me today which indicates some linkage between that issue and some other discussions that I do not think were being addressed in the conversation concerning automatic elevation.

This is something we need to address, because the role of the Assistant Secretary in this effort, we think, is crucial. We do not think that it is parallel to the 1980 situation where we had five different levels of elevation. We are talking essentially about one level of elevation.

The second issue is of somewhat more concern to us, and that is the question of a resource-based criterion, because this is really the heart of the whole thing as far as we are concerned. Frankly, I understand some of the difficulty the corps has with relating the process, permit process to resource impasse.

But from our standpoint, our whole role in this permitting process is related to mitigation. Our efforts are in the nature of trying to assess and understand impacts, resource-based impacts from a wetlands standpoint.

If we cannot relate that to the permitting process that is going on within 404, then we have to question our basic reason for being involved in the whole permitting process, because that is really the heart of our concern.

At the present time, the corps controls mitigation within the context of 404. We have, as a result of the past 3½ or 4 years, relegated that control to them. In return for that, they have made statements and they have allowed themselves discretion in developing the permit process to address mitigation concerns.

We have not felt, however, that the mitigation efforts that were undertaken were always consistent, and we feel that there needs to be some policy guidance at the Washington level so that the district engineers in the field can understand, in a more consistent way, what the corps policy is on mitigation. We feel that it has to be related to a resource-based criterion.

Senator CHAFEE. I won't argue with that. What do you say to that, Mr. Dawson?

Mr. DAWSON. Mr. Chairman, thank you.

Mr. Potter has touched on a large number of issues, and I might respond just on two or three of them and then any others that you and Senator Mitchell would direct me to. I think we have made some headway. I would not describe where we stand on the remaining two issues as an impasse. I think, again, it is significant to note that the Army has yielded on those three that we have already alluded to.

On the issue of some sort of additional opportunity for Fish and Wildlife Service to have to make sure that they can be confident, and you can be confident, that their views are being given consideration, we have put on the table a number of items that I think are very worthy of consideration and give me reason to feel we are not at an impasse.

For example, we have offered a scheduled monthly meeting between the division engineer and the regional director so that any differences on specific cases or any general disagreements can be aired.

We have also offered an automatic elevation on issues where there are differences of opinion on a particular policy or a particular issue where that elevation could occur automatically.

Mr. Potter has already mentioned the additional consultation that we provided for before the decision of the district engineer is announced. We think giving that extra 10 days or so for give and take at the lowest field level will provide some of that additional opportunity.

One of the other areas that Mr. Potter mentioned, quite rightly, was his concern about the need for resource consideration and review of resource management aspects.

Senator CHAFEE. I must say that seemed to me to be a logical request. What Mr. Potter is saying is that one of the criteria on which the permits could be elevated would be the projected impact on fish and wildlife by the project. That is what the Fish and Wildlife Service is all about, isn't it?

Mr. DAWSON. Yes; and as I was about to say, and I would like to, if I may, take just a moment and then respond directly to your point. We feel that there are many, many reviews of the resource concerns within the process already. I would like to submit for the record, that there are a number that I might mention. The Corps of Engineers in our regulations require that fish and wildlife, wetlands, endangered species, and other environmental concerns must be considered in the decisionmaking process.

So I think it is important to note that there is not an optional, but a required consideration of resource concerns already. Now, as far as the factor of fish and wildlife concerns being a factor for elevation, Mr. Chairman, we submit that that is already a grounds for elevation if that is an issue of national importance concerned with the particular permit application.

If it is a local issue where the field people are in the best position to make the decision, if their technical expertise is superior to any that we can find on up the line, and we are not talking about a policy or a national issue, then it is our view that we are better off not bringing it up the line where the staffs and the decisionmakers are probably not as well equipped to deal with the issue as the people down at the field level are.

Senator CHAFEE. I think to require that the resource impact be of national concern is going too far. I mean, the impact on fish and wildlife is pretty hard to prove that it shapes the whole Nation, but nonetheless, it could be extremely important.

Mr. DAWSON. I agree with you, Mr. Chairman. My point is that from a practical standpoint, if we elevate it to the division engineer or the chief of engineers or to my office, if it is a local, very important, but local environmental issue, the ability of the expertise as we move up the line to deal with that issue, in our judgment, is not improved and, in fact, often diminishes. The district people are best able to deal with that problem in most cases, unless we have got a national policy issue or an issue of far-reaching importance.

We don't think the decision gets any better as it comes forward.

Senator CHAFEE. I am not sure I agree with that. You could easily have a situation where, for one reason or another, local people didn't consider it or were too busy or didn't seem to get the effect of the impasse, and therefore, Mr. Potter and his people wish to elevate it. I can't see them doing this every day of the week, but it is a tool they ought to have in their hand.

What is your answer to the other statement, requiring the corps to review a permit if he requests it?

Mr. DAWSON. Mr. Chairman, we have tried to address that in a way that preserves what we think is one of our most important reforms, and that is, to get the decisionmaking process into the hands of one agency so that the regulated public and the agencies involved know who is responsible ultimately for the decision.

What we have tried to do, though, is respond to Mr. Potter's concerns, very legitimate concerns, and the concerns of this committee by coming up with alternative ways to ensure that their concerns are addressed that are short of what we would call an automatic elevation.

The reason we are trying so hard to find a way short of automatic elevation is, again, to preserve what our field people tell us has been the most valuable of the reforms which we have achieved. We have suggested a number of ways to do this.

One is the monthly meeting between the regional administrator and the division engineer during which any issue could be brought forward.

Another is an automatic elevation of any issue where we would have a very limited and circumscribed amount of time to address any issue that the other agency brought forward.

I think this would avoid some of the problems we have had of these issues repeating themselves and festering and reoccurring on more than one application.

Senator CHAFEE. My time is up.

Senator Mitchell.

Senator MITCHELL. Thank you, Mr. Chairman.

Mr. Sanderson, welcome.

Mr. **Sanderson**. Thank you, sir.

Senator **Mitchell**. We look forward to working with you in the coming months and appreciate your statement.

Mr. Dawson, as you recall at the last hearing, I asked you a series of questions. Specifically, I asked whether there is a national policy regarding jurisdiction over isolated wetlands and if there is, what is it, and then beyond that, I asked the specific question, and I quote now.

> Do you agree that isolated wetlands are within the Corps' section 404 jurisdiction whether they are used by migratory waterfowl which establishes the Interstate Commerce's basis for jurisdiction?

You demurred at at that time and indicated that you would be prepared to respond at a later time.

I have since had the opportunity to review your letter to Senator Chafee with the enclosures, and I would like, if I could, to go to that subject first and then get into the definition of fill later.

On the second page of the enclosure with your letter, under paragraph number 4, you state.

> It would follow that no guidance of general amount of stability could be promulgated by Army on the subject of CWA jurisdiction over isolated waters unless EPA concurs with that guidance.

Do you see the section I am referring to?

Mr. **Dawson**. Yes, sir.

Senator **Mitchell**. I guess we are in a chicken-and-egg situation here. I wonder whether or not we can get an understanding from you and Mr. Sanderson that one or the other will promulgate a national policy and request the other's concurrence; some basis for making these decisions nationally.

Mr. **Dawson**. Senator Mitchell, as I pointed out in the paper to which you have referred, there is one case pending at the moment, as you are well aware, before the U.S. Supreme Court that I think will give us—and one of the reasons that case was appealed was to try to get where I think you wish to get, and that is to have a definitive legal judgment on what the extent of jurisdiction is.

Whether or not it would be wise or, rather, we would be able to do something before that decision comes out is a tougher question. I think that the decision is imminent. I believe it is expected in the fall session, if I'm not mistaken on that.

I think in the meantime, from what I have been able to learn since you raised the question earlier, that the Corps of Engineers generally does accept the notion that migratory waterfowl does constitute a nexus with interstate commerce.

I have read, and not carefully, but hurriedly on the way over, the Solicitor of Interior's opinion, which I think asserted that connection. In a quick reading, I didn't see anything that we take issue with.

Senator **Mitchell**. Let me first say that speaking for myself, I strongly encourage you to develop a promulgator policy. There have been many court cases on the subject, and while a Supreme Court decision contradicting any policy would necessitate a change, obviously, I hope that you will proceed.

We don't know when the Court is going to act; what they are going to say, and I think to defer further action because there is a case now pending in court, particularly where there is a law on the books that has been passed by Congress, I think, would be unwise. I encourage you to proceed to develop a national policy in that regard.

Mr. Sanderson, at pages 8 and 9 of his statement, has listed seven factors which he emphasizes is not all inclusive but is an effort to use by example the type of factors considered.

I wonder, Mr. Dawson, have you had a chance to look at that part of Mr. Sanderson's testimony?

Mr. DAWSON. Yes, sir. Maybe Dick can show me again. I believe most, if not all, of those factors are contained in the 404(b)(1) guidelines that we are applying now.

Senator MITCHELL. That is correct.

Mr. DAWSON. Many of them are already in the guidelines that we must apply when we look at the question of jurisdiction. Some of those, I think, were referenced in the response that you quoted from.

What I think we could certainly do is look at these carefully and respond to you on any, there may not be any, that we would take any issue with.

Senator MITCHELL. Let me, Mr. Sanderson, go to these, if you would refer to those pages of your statement. You have listed, as I indicated, seven factors to be considered. Those relevant to the subject we are now considering, are items four and five on page 9, the fourth and fifth in series. The fourth one reads, "Waters used as habitat by birds protected by migratory bird treaties." Then a sentence expands on that, and the fifth one is, "Water used as habitat by other migratory birds which cross state lines."

My first question, Mr. Sanderson, is, I notice that in the first three items, referring to the other types of water, you use the phrase "waters which are or could be used," that, of course, reflecting a long line of court decisions regarding navigable waters and other applications of interstate commerce jurisdiction which say that the specific use of a water for navigation is not necessary, so long as it could be so used.

However, with respect to the subject matter under consideration here, you have deleted the words "which are or could be" and have required specific waters used as habitat, waters used as habitat. Could you explain to me why you have done so?

Mr. SANDERSON. We attempted, particularly on this issue, to make those factors resource-based, that is to determine their uses. I understand the continuum ranging from substantial to potential use and the problem that it poses to you. We believe that by looking at it in this fashion, rather than saying, for example, that endangered species could be species in that particular area, we think there has to be some proof the area is being used by endangered species for that purpose.

Senator MITCHELL. I am not asking you about endangered species. I am asking about migratory birds. It is your position that in determining whether a particular isolated water is a prairie pothole is subject to the jurisdiction of section 404? You are saying there would then have to be actual evidence of its use by those birds as opposed to evidence that it could be used?

Mr. SANDERSON. Yes, sir.

Senator MITCHELL. You are saying it has to be actual use?

Mr. SANDERSON. Yes, sir.

Senator MITCHELL. What is the legal basis for that?

Mr. SANDERSON. There has to be at least some kind of evidence it is being used for that.

Senator MITCHELL. But that is not the law, Mr. Sanderson. You don't have that in the first three cases. You say, for example, in the first one, "waters from which fish or shellfish are or could be taken." You don't have to prove that shellfish are taken from such waters.

The second one, "waters which are or could be used by interstate or foreign travelers for recreational or other purposes." You don't have to prove that any foreign traveler uses them for recreational purposes. The third one, "waters which are or could be used for industrial purposes engaged in interstate commerce."

Why are you establishing a legal distinction in this one area that has no basis in law and does not exist even with the other categories that you have identified here?

Mr. SANDERSON. My general counsel's staff informs me that there could be jurisdiction if the class or type of water is generally used by migratory waterfowl. Essentially, I think the point that you have made was overlooked on my part, and I will add that for the record.

Senator MITCHELL. So I think a more proper phraseology here would be to insert in the fourth and fifth items, after the word "water," the same words which appear in the first three categories, "waters which are or could be used."

Mr. SANDERSON. I think that is a legitimate interpretation. If I may, I would like to confer with my counsel before I do it, but I will get back to you on the record.

Senator MITCHELL. All right.

Mr. Potter, do you have a commentary on that subject? I have the letter from your counsel, and it discusses the legal background in what I think is an accurate way. But it doesn't make that statement. It does make others that are tangentially supportive of this interpretation, but it doesn't make that statement.

Mr. POTTER. We responded to the narrow question of whether or not the use of isolated wetlands by migratory waterfowl could establish a nexus to interstate commerce. We responded in a positive way, without regard to the question of use, in this particular opinion.

Senator MITCHELL. Then let me ask you the broader question. Is it necessary that there be evidence of actual use of migratory waterfowl of a specific water before the jurisdiction of section 404 is applicable?

Mr. POTTER. Based on what I understand, it would not be, but I would defer to Jan Wade, if I am wrong. She is our counsel.

Senator MITCHELL. May I ask where she is?

Mr. POTTER. Jan is here.

Ms. WADE. I cannot speak for the Solicitor.

Senator MITCHELL. Please identify yourself.

Ms. WADE. I am Jan Wade. I am in the Solicitor's Office. I cannot speak on behalf of the Solicitor today. I will have to do more research, but I do not think, in my opinion, that you have to have evidence of actual use.

Senator MITCHELL. You don't think what?

Ms. WADE. You do not.

Mr. POTTER. The way that I read the opinion, Senator, is that without regard to the question of use, the nexus cannot be established. However, actual use is not necessary. That is the way I understand it.

Senator MITCHELL. That the particular water be capable of the use concerned.

Mr. POTTER. Correct.

Senator MITCHELL. And whether or not it is actually used is irrelevant for establishing jurisdiction. That is certainly the law with respect to navigation on navigable waters, is it not?

Mr. POTTER. That is the way I understand it.

Senator MITCHELL. I would appreciate it.

Mr. Potter or Miss Wade, would you confirm that response in writing? I know you want to do more research, and I understand and respect that.

[The information requested follows:]

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, DC, August 2, 1985.

Hon. GEORGE J. MITCHELL,
U.S. Senate, Washington, DC.

DEAR SENATOR MITCHELL: Pursuant to a request from Senator Chafee, this office previously submitted an opinion to the Subcommittee on Environmental Pollution in which we determined that the use of isolated wetlands by migratory waterfowl was sufficient to establish the necessary nexus to bring isolated wetlands within the potential reach of Section 404 of the Clean Water Act. Our conclusion was based on the interstate and foreign economic value of migratory birds and the vital functions which isolated wetlands provide to these species.

At the oversight hearing before the Subcommittee on July 15, 1985, you requested that we further consider whether actual use of isolated wetlands by migratory waterfowl is necessary to establish the requisite nexus to interstate commerce. There exists no definitive case law on this point. Therefore, we feel it would be inappropriate to advance any legal conclusion on this matter at this time.

Sincerely,

KEITH E. EASTIN,
Associate Solicitor, Conservation and Wildlife.

Senator MITCHELL. You, Mr. Sanderson, I know you want to do the same, and I certainly respect that.

Mr. Dawson, let me ask you whether you have a position on that particular question.

Mr. DAWSON. Senator Mitchell, I do not, and I do believe that nothing that the three of us could say would make that true or not true. I believe that before we could promulgate such a position, it would very likely require a rulemaking.

Many of the provisions that Mr. Sanderson cited are in our regulations. We adopted them in 1982 from EPA to make our definitions as consonant as we could.

So I would say that I am concerned about the practicability of a regulatory scheme that relies too much on future or conjectural use.

There may be a way to do that that would be understandable by the public and by those concerned about the resources, but I think it is a concern that might also justify the use of rulemaking and make sure we hear from all sides on that point.

Senator MITCHELL. I just want to make this point, Mr. Dawson, which I made at the previous hearing. You are required by law to administer and enforce the law.

The only thing you have now in this area is a clear expression of congressional intent to exercise jurisdiction under the commerce clause to the fullest extent permitted by law.

Any reading of the background of this must inevitably lead to the conclusion that you should ascertain and implement jurisdiction over isolated wetlands for the reasons that have emerged during this question-and-answer period and the previous one.

I think you have to do that. That is incumbent on any public official who has to enforce the law. You may disagree with it.

I used to be a prosecutor, and I don't agree with every criminal law, but you can't leave it up to every individual person implementing the law to decide whether it makes sense or is practical; whether it can or can't be done. In our system, that is a legislative determination. The legislature in this area has spoken.

I hope very much, and I encourage you, and I will now ask you if you would, in conjunction with the EPA and with guidance and advice from Interior, propose some national policy in this regard so that it can be uniform and applied and understood and we will know what you are doing and others will know what you are doing. That is really what this is all about, as I am sure you know. Will you do so? And will you advise this committee of your actions in that regard promptly?

Mr. DAWSON. I would certainly be most willing, Senator Mitchell, to work with my colleagues and do our best to do that. I think we already have a good base to start from in the national policy that is already enunciated.

It is clear to me that you feel we need to go farther with that. Certainly, we need to look at this. I think there is a difference of opinion among some of the lawyers on what we can do with rulemaking or without. But whatever steps have to be taken, it seems reasonable to me we could report back to you on what steps might be undertaken.

Senator MITCHELL. Mr. Sanderson, will you participate in that effort?

Mr. SANDERSON. Certainly.

Senator MITCHELL. Thank you.

Mr. POTTER. Yes, sir.

Senator MITCHELL. Mr. Chairman, I have gone over my time. I have one other area, but I will defer to you.

Senator CHAFEE. Thank you. In just carrying on with what Senator Mitchell says, it seems to me that as we said last time, and I think I directed my remarks to Mr. Dawson, that every single court case on this subject has been to extend the law to the reef over wetlands to the furthest extent possible. The court hasn't cut that.

Don't you agree with that? You say there is a Supreme Court case that is coming along that might be different. We can't wait around for some Supreme Court case that might be different. We have got to get going on these things. What brought it up was the vague instructions that you gave out to your 37 districts that you have got?

Mr. DAWSON. Districts, yes, that is right.

Senator CHAFEE. It was our feeling, and I think you agreed with me, that you pretty well left them on their own, saying that it is a little hard to find out just how far this goes and what waters it encompasses.

You will have to fly by yourself out there.

As Senator Mitchell has pointed out, that doesn't seem to be the case at all. The Court has gone very far on these matters.

We have talked about the memorandum of agreement between Fish and Wildlife and the Army. Now I would like to talk about EPA and the Army.

Miss Cooper testified last time that EPA is seeking to make some adjustments to its MOA. In June 1984, which is 1 year ago, Mr. Ruckelshaus wrote to the corps to terminate its MOA. EPA wanted some modifications.

My question to you, Mr. Sanderson is, What is happening?

Mr. SANDERSON. We can report a number of things. As you may recall, in the letter that Mr. Ruckelshaus sent to Secretary Marsh, there were five primary issues which he wanted to discuss and modify.

One was the delegation of signature authority at the regional level.

Senator CHAFEE. Let's take each one and tell me what is happening. The first one is the delegation of the signature authority for letters commenting on the permits. What is happening?

Mr. SANDERSON. Yes, sir; under the 404(q) MOA that was in effect at the time that Mr. Ruckelshaus wrote to Secretary Marsh, the regional administrator was cited as the person who signed the letters.

In the memorandum of understanding, it did not specifically say that he was not allowed to delegate that authority, but that was the corps' interpretation of it. EPA's difficulty is that our 10 regional administrators have many other things to do besides review the thousands of 404 permits that come through each year. They also have to deal with the Superfund and with other issues.

We have negotiated that point with the corps. EPA originally sought that authority for the section or the branch level, where the people who are really the technicians know the issues. We have agreed to place that authority at the division level. The corps would accept our division level signatures as opposed to the regional administrators.

I think that indicates a willingness on our part to move it up from the lowest possible level. The corps has acceded to a portion our position.

Senator CHAFEE. So that is settled?

Mr. SANDERSON. That is right.

Senator CHAFEE. Is this settled in principle or settled in fact?

Mr. SANDERSON. It is settled in principle.

Senator CHAFEE. Well, that is not good enough. Have you got a letter from the corps saying they will accept that?

Mr. SANDERSON. We have a number of documents which Mr. Dawson and I have worked on. That is one of the issues that we have settled in principle. There are still others that we have not yet settled in principle.

Senator CHAFEE. You weren't here before, but I can't consider settlement in principle anything. It is either settled or it isn't settled. Have you agreed? Is this completed?

Mr. SANDERSON. Yes, sir. We have agreed, however——

Senator CHAFEE. If that is how it is, that is fine.

Do you consider it completed, Mr. Dawson?

Mr. DAWSON. Yes, sir.

Senator CHAFEE. Do you agree?

Mr. DAWSON. Yes, sir.

Senator CHAFEE. Let's go to the next one, the elimination of field level review which raises issues to the Assistant Secretary of Administrator level. How will you go on that one?

Mr. SANDERSON. We have had some basic disagreements on that issue, and those disagreements relate to the fact that we would like to have our regional administrator and the division engineer—the 11 division engineers and the regional administrators—be able to settle on criteria for the elevation so that as many decisions as practical can be made at that level without being elevated to the assistant secretary or the assistant administrator level in Washington.

Senator CHAFEE. Where does that stand?

Mr. SANDERSON. We have had considerable discussion on it. I think we are still at the same position we were earlier.

Senator CHAFEE. Nowhere, in other words?

Mr. SANDERSON. Yes, sir.

Senator CHAFEE. All right. How about requiring the corps to review a permit and request it by EPA?

Mr. SANDERSON. EPA has acceded to the corps' position that there will not be a mandatory review on things that we send to them.

Senator CHAFEE. Let's try that again. EPA, you have given up on that one?

Mr. SANDERSON. Yes, sir.

Senator CHAFEE. It seemed to me that is a pretty big one, isn't it? That is just like Fish and Wildlife's one.

Mr. SANDERSON. In order to accommodate both sides, there needs to be a certain amount of good faith negotiation, and we have tried to have good faith negotiation on that issue.

Senator CHAFEE. All right. Let's see how you make out on some of the others. Four, allow permits to be elevated on environmental grounds. That is just like the Fish and Wildlife.

Mr. SANDERSON. Essentially, the criteria issue is tied to the elevation issue between our regional administrator and the division engineer. These issues are the two primary areas where we have not been able to find agreement yet.

Senator CHAFEE. I have only found one area where you have gotten agreement. Let's try No. 5, better coordination between the MOA at the 404 (q) and (c) level.

Mr. SANDERSON. I think we have found an area of accommodation on that point. We had originally asked for a 20-day period following the completion of the 404(q) process to accommodate and the 404(c) process. Army had a different perspective. We compromised on a 10-day period. I think that is workable for both EPA and the Army.

Senator **Chafee**. Do you agree to that, Mr. Dawson?

Mr. **Dawson**. Yes, Mr. Chairman. If I might go back to the issue of automatic elevation, I think that with Mr. Sanderson's help, we have come up with some very innovative possibilities. We have not agreed on the best way to proceed, but we have talked about—and I alluded to these very briefly earlier—the idea of an automatic issues elevation; also, I think the idea of regular monthly meetings between the regional administrator and the division engineer to ensure better coordination and to give more conficence that the views of the EPA were being given full and fair consideration.

Another very important change that we have already agreed to is that when the district engineer makes a decision or is about to make a decision that is countered with a recommendation of EPA, the process would stop for about a 10-day period, during which the field representatives from both agencies would take another run at it, so to speak, and the concerns of EPA would be looked at again in response; the reasoning of the district engineer would be exposed. We think that that, as much as anything, would help give the assurance that the views of the EPA and ultimately, the other agencies, are given credence.

So I point those things out in an effort to show you that we are looking at innovative ways that we think will add to the assurance that the views of the agencies are factored in.

Senator **Chafee**. I must say, Mr. Sanderson, that those two points here, allowing the permits to be elevated on environmental grounds and requiring the corps to review a permit when it is corrected, that is the guts of the whole business, it seems to me.

Mr. **Sanderson**. We agree with you, sir.

Senator **Chafee**. You don't agree very much; you have given up on one of them.

Mr. **Sanderson**. No; we haven't. We believe that in giving up on that one we are able to have an automatic elevation agreement at the division engineer level that it will, in fact, prove more workable, be better for the applicant, and reduce to the lowest possible level the point at which these kinds of decisions can and should be made.

Senator **Chafee**. Where do you stand on these? Are you getting along with them? You haven't got them in concrete yet; are you getting close, or do you know?

Mr. **Sanderson**. In the last 10 days, we have reached an understanding which was not readily apparent before.

I recognize Mr. Ruckelshaus articulated EPA's position in June over a year ago. I think the Army has come to recognize the validity of our positions. We are making progress, but we do have further steps to take.

Senator **Chafee**. What about the definition of fill? Is there anything you can say to this committee, Mr. Sanderson, to demonstrate that EPA has in place a mechanism to regulate discharges of accidental or waste fill materials?

Mr. **Sanderson**. No; we don't. We are continuing our cooperative effort with the Army, to determine the geographical areas of concentration and types of activities most often encountered with dealing with the full problem in our attempt to resolve this issue.

Senator **Chafee**. All right.

Senator Mitchell.

Senator **Mitchell**. Mr. Chairman, on that subject, Mr. Dawson, your letter to Senator Chafee of July 15, which you will recall has a lengthy report attached to it, the third page of which deals with the subject matter of definition of fill material, do you recall that?

Mr. **Dawson**. Yes, sir.

Senator **Mitchell**. Mr. Sanderson, are you familiar with that?

Mr. **Sanderson**. Yes, sir.

Senator **Mitchell**. First, I commend you you for setting in motion a process for a specific determination of this issue. I note that your memorandum indicates that a deadline target of January 1, 1986, has been set for enunciating a workable definition of fill material. I encourage you both to pursue the discussions and to meet that deadline.

My first question to you is: What will happen between now and January 1, 1986?

Mr. **Dawson**. Senator Mitchell, what I see happening is, I think we are breaking through some of our inertia and will bring out a good procedure, now, to move toward a decision. As you know, both agencies have been studying this problem pursuant to the court order; that actually this count was dropped, but the agencies agreed to go forward anyway.

What we have been trying to do is find out the extent of the problem. How much State regulation is already occurring and other information will help us make a good decision. Both agencies are committed to wrapping up that search for information by September 1, I believe.

I don't have that letter before me, but I believe that is the day. Then a month later, October 1, we would try to arrive, would arrive, I am sure, at a joint statement on what we had found, the two agencies working independently.

Then using that data and status information on what is going on out in the field, we would endeavor to resolve the issue, whether we use 402 or 404, by the end of the year. That would give us, then, 3 months to work it out; assuming we don't have to go through the rulemaking.

If we have to go through rulemaking, we might be looking at another 30 to 60 days. But in any event, I think we all are encouraged that we have a deadline now. OMB is involved. They have indicated their desire to move or help us move toward that deadline. I believe we will be able to do so.

Senator **Mitchell**. I would ask both you and Mr. Sanderson to advise the committee in writing of the status of such progress at each of the dates set forth in your memorandum.

Mr. **Dawson**. Yes, sir.

Senator **Mitchell**. At the first you indicate it was agreed that both agencies would be able to exchange the fruits of their completed studies in about 30 to 45 days, which I would take to be somewhere in late August.

Mr. DAWSON. That is right.

Senator MITCHELL. Then you say that leading to a meeting around October 1 to arrive at a joint position on the studies and a means to resolve the issues once and for all.

So I would ask you to submit letters to the committee at the time that the studies are exchanged in late August, and again, on or about October 1, at the time of the meeting, a report on the progress that is being made.

I still don't know what is going to happen in the meantime, though, and I wonder if you would address that.

I commend you for what you are doing on reaching a position that will resolve it. In the interim, obviously, the problem continues. Is there any proposal to try to deal with it in at least a stopgap way in the interim?

Mr. DAWSON. I believe Miss Cooper began to address that issue at the last hearing. I would defer to my friend, Mr. Sanderson, if I could.

Mr. SANDERSON. That is very generous of him, Senator.

Senator MITCHELL. Before you begin, Mr. Sanderson, I will say that in your statement, you said, "Within a few weeks EPA and the corps will compile the data and will proceed to develop our report on the study."

That is almost word for word what Miss Cooper said weeks ago.

Mr. SANDERSON. We are a few weeks closer than when Miss Cooper said that to you.

Hopefully, the data, again, without being overly facetious, should be available to us by the end of this week. I think the Army has most of their data already in. I would hope that we can have an exchange of data within the next 10 days or 2 weeks. We are really looking at a late August or early September deadline for us to have it done. I think that the information that Mr. Dawson gave you on our timetable is essentially achievable. I don't anticipate coming back to you and saying in 1986, "We will see you in 1987." I do hope we have that information, and I plan to have it for you.

Senator CHAFEE. Mr. Sanderson, I can guarantee you, you are going to be back here before 1986.

Mr. SANDERSON. Thank you, sir. I anticipate it.

Mr. DAWSON. Senator Mitchell, I think on the specific question of what is going to happen in the meantime, one of the points with which everyone agreed at the meeting we had since the last hearing involving OMB, Army, and EPA was something you asserted in your opening statement, and that is, that these kinds of fill must be regulated under the Clean Water Act. I would hope that in the meantime, until this issue gets resolved, it is not a good situation at all, but any person who desires to fill in one of these ways in the uncertain area does not have the legal authority to do so.

That is not a good situation, because they don't have an agency; each agency sends them to the next agency.

But I would hope that there would not be filling going on in the meantime. That is what I was deferring to Mr. Sanderson, because I believe Miss Cooper at the last hearing indicated some steps that EPA was taking in the interim, but I don't recall the details of that.

Senator MITCHELL. Then, Mr. Sanderson, I would ask you, and you, Mr. Dawson, as well, would you give us a written report within 7 days of what you are proposing to do in the period between now and the final resolution of this matter?

Mr. SANDERSON. Yes, sir. I would be pleased to.

Senator MITCHELL. I want a statement of what your intended activity is. I think Mr. Dawson is quite right. The other part of the problem is that it really does reinforce public frustration with dealing with the Government, the whole bureaucratic process if someone does want to engage in an activity which may well be eligible for permit. They have got no place to go. They can't get a response. I think it is important that we not only resolve the finding that I commend you for, but also that we have some mechanism for dealing with this problem in the interim.

I thank you very much.

Mr. Chairman, I thank you.

Senator CHAFEE. Thank you.

This is a question directed to Mr. Potter on mitigation. You mentioned that in your opening statement. I would just like to know how we are doing on that. What is taking place?

You had some problems with the corps, you felt, certainly, in connection with the Bakersport case.

Mr. POTTER. I think that Bakersport is an illustration, Senator, of a situation where we find conflict between the stated mitigation policy that came out of that permit and the corps' own guidance in terms of flexibility in determining mitigation needs. I think our problem is that we do not know exactly what the mitigation policy is.

You mentioned earlier that you had a discussion with Bob about local decisions, and I stated earlier in the hearing that we feel that there is a need for guidance at a higher level in order to provide consistency in and a framework within which these local decisions can be made. This really links the whole mitigation question directly to cumulative impacts, which is something you cannot understand unless you have a broader perspective.

Our concern with migitation policy is that, regardless of what corps' policy is, the only stated policy they have on mitigation, I think, deals with Federal projects. I do not think that they have a stated policy in the regulatory program, and certainly, it is not the same as our mitigation policy.

This issue was addressed directly by the CEQ and the Tennessee-Tombigbee referral, and we have been directed to try to bring some consistency and predictability into the mitigation policy within the Federal family. I think that this provides us an opportunity to do it.

But some of the concerns that we have are, in general, related to the Bakersport permit. In some of the other permits that we have dealt with, we seem to see a tendency on the part of the corps to say that anything can be mitigated for, and that certainly is not our policy.

We feel that some wetlands simply cannot be replaced. We are now down to about 5 million acres of wetlands in the Nation since 1976. We have lost about 4 million, which is a little over 4 percent of what is remaining.

We are seeing a rapid decline, and we are certainly getting close to the edge in some areas where we have emerging marshlands, bottom land hardwoods, and other very vulnerable wetlands. Playa lakes in the central flyway, for example, are essentially crucial to migrating populations. It is also important that playa lakes fall within the jurisdiction of 404.

Our problem is that we understand the corps' concern about meeting to make decisions on a local basis, but we see no articulation of an overall consistent policy at the Federal level to feed that local decisionmaking process.

Our situation is really an either/or situation. We are saying basically, "OK, our expertise is in the area of mitigation. Either allow us to have a greater hand in determining mitigation or the alternative is to provide us with a resource-based criterion that would clearly be understood within the MOA itself." In other words, it is one option or the other. We need one or the other in order to really be effective.

Senator **CHAFEE**. That seems to make so much sense to me. As I understand the present situation, when it comes to mitigation, the corps is the one that sets forth what the mitigation policy is to be; isn't that correct, Mr. Dawson? Take the Attleboro situation, for example, which we discussed last time.

The corps has decided that there should be mitigation, and they set up what the mitigation is to be, at least, as I recall, in that particular situation.

Fish and Wildlife isn't consulted, as I understand it. Is that correct, Mr. Potter?

Mr. **POTTER**. I think that we have expressed reservations about the mitigation decision that was made at Attleboro. The position we take is that on water dependency, you do not even get to the (b)(1) guideline, question unless you address the water dependency question first. As I understand the Attleboro situation, the corps has said that water dependency aside, we believe you can mitigate fully to replace this marshland, where the permit would be issued.

The policy in the past has been that you would not even address that issue if you did not have a water-dependent activity. The Fish and Wildlife Service's feeling is that a shopping mall is not a water-dependent activity.

Senator **CHAFEE**. I don't want to spend any time particularly. I am just using that as an illustration. It just struck me as odd that Fish and Wildlife wasn't involved in mitigation. Do you have any comment on that, Mr. Dawson?

Mr. **DAWSON**. Mr. Chairman, if I might, briefly. Mr. Potter has made an awful lot of statements, and I wish we could take each one. I think the characterization of the corps' decision in Attleboro is simply not accurate.

I think you are right, that Fish and Wildlife Service must be consulted under the law.

The Fish and Wildlife Coordination Act, in fact, requires the corps, and, I think, every other Federal agency, to consult with the Fish and Wildlife Service.

But the ultimate decision on mitigation under the law is left to the action agency. The corps does have, notwithstanding Mr. Potter's statement, does have a mitigation policy statement. It is in our regulations, section 325.4. That policy was rewritten as part of the lawsuit settlement back in 1982.

The 404(b)(1) guidelines are still very much applicable, and they speak to the issue of mitigation, as well. It is obvious we need to communicate better between us, but I certainly would state to the committee that we have a mitigation policy that is laid out, I think, in great detail.

Senator CHAFEE. Gentlemen, as you know, what originally brought us here was the oversight on 404, in particular, and the memoranda of agreement we are trying to push you folks into completing. You are way beyond agreements in principle, and those have not yet been done.

Therefore, I am not stopping until we get those completed. So, gentlemen, we will invite you back here in September to go over this, and we want those MOA's done with. Then we want the definition of fill and out of interstate commerce, of which Senator Mitchell discussed previously.

Some more complete statement of mitigation cooperation that you touched on here, Mr. Dawson, would be helpful to me.

I personally find it hard to understand how mitigation works. You indicated that some fuller cooperation, I think you said, was required. I don't know what you are suggesting as far as that fuller cooperation. It seemed a very odd setup to me. I would be interested in what you suggest.

When we come back in September, here it is July 15. We are leaving here in 15 or 16 days. The first part of September we will get you gentlemen back up here and see how you are doing. I just hope you are finished.

Senator MITCHELL. And I can stick out these hearings as long as you can.

Senator CHAFEE. We want these things completed. We have got other things to do, as I am sure you do.

Mr. POTTER. Mr. Chairman, if I might, I think that one of the things that is really driving the different viewpoints of the two different entities—that is, the Fish and Wildlife Service and the corps—is that the Fish and Wildlife Service takes their guidance in much of the permitting activities from the Fish and Wildlife Coordination Act. The Coordination Act was really the instrument that gave birth to the concept of mitigation, and I do not think that you will find that the actual word is mentioned in either the National Environmental Policy Act or in the Clean Water Act, in any context, nor is it defined in any way.

As Bob indicated, we do have to be heard on the question of mitigation within the context of the Coordination Act. But I see the driving force behind the corps' activity as being more 404(q), and that is more process oriented.

I think that the corps is looking at this program as a regulatory program that basically Congress spoke to in the 1977 amendments. These amendments established a new section of the Clean Water Act that said that these things have to be done in a timely manner I think that that is really their primary guidance from their standpoint, and you have an essential conflict here. I think that there is a possibility that Congress can clear some of this up.

Certainly, the Coordination Act amendments are on the Hill. They are before this committee, and they are also in the House. I think that the amendments may be an opportunity for Congress to address some of these questions.

Senator Chafee. That may be, but if it comes to that, then we will have to address it. I must say that if we get into legislation on these matters, often times, we can write legislation here, but if the parties involved can't work it out, then all the legislation in the world doesn't do it a great deal of good. We don't want to be legislating everything to you folks. We want you to be able to resolve these problems in arriving at a solution that is set forth in the general framework by the Congress.

But we don't want to be doing every little nitpicking job that we think you ought to be doing.

Mr. Potter. I know that this committee has had some concerns about our role in terms of forcing the issues more than they have been forced in some cases.

Senator Chafee. Maybe we will get to that.

Senator Mitchell.

Senator Mitchell. No further questions, Mr. Chairman. I thank you for the hearing. I thank you gentlemen for coming up this afternoon.

Senator Chafee. Thank you, gentlemen. We will see you in September.

[Whereupon, at 3:44 p.m., the subcommittee was recessed, subject to the call of the Chair.]

[Mr. Sanderson's written statement follows:]

STATEMENT OF
RICHARD E. SANDERSON
ACTING ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
U.S. SENATE
JULY 15, 1985

I welcome the opportunity to appear before the Subcommittee today to continue the discussion regarding the Environmental Protection Agency's (EPA's) Section 404 Program under the Clean Water Act. A number of inportant issues have been raised since these hearings began, and I believe it will be helpful if I present an opening statement to provide the additional information that has been requested.

The Subcommittee has requested that EPA provide an explanation of why we vacated our original determination of the wetland boundary line on the Tensas Basin Tract in Louisiana.

To explain that situation requires that I provide some background on the arrangement between EPA and the Corps for drawing regulatory boundary lines in the Section 404 Program. Because wetlands are often transitional systems between open water and dry land, sometimes there is not a clearly defined or easily identifiable line to mark the limit of the wetland. This has resulted in different views of the extent of Section 404 jurisdiction among the Federal agencies in a number of cases. In the face of one such disagreement, the Department of Justice was asked in 1979 to determine whether EPA or Army had the ultimate administrative authority to assess the jurisdictional scope of the Clean Water Act. The Attorney General concluded that EPA had that authority.

EPA and the Corps agree on the approach to drawing boundary lines for many kinds of wetlands. Consequently there is no need for an EPA on-site inspection. In recognition of this fact, the agencies in 1980 signed a Memorandum of Understanding (MOU) on jurisdiction. Under the MOU, the Corps establishes jurisdictional boundaries in response to 404 applications or pre-application inquiries unless EPA defines a "special case" and retains the responsibility to establish jurisdiction. Special cases are those situations where significant issues or technical difficulties exist concerning the jurisdictional scope of Section 404 waters, the environmental consequences of jurisdiction are significant and EPA has declared a special interest. While the Memorandum of Understanding on Jurisdiction has expired, we continue to follow its procedures until negotiations between EPA and Army produce mutually acceptable revisions.

In 1980, EPA listed many bottomland hardwood wetlands in the Lower Mississippi Valley as a special case. Because the Tensas Basin Tract fell within that special case definition, EPA's Region VI office in Dallas made the initial boundary call in 1981. The Region determined at that time that 102,000 acres of the 110,000 acre tract were wetlands subject to regulation under the Clean Water Act. Subsequently, the owners of the Tensas Tract questioned the scientific validity of our boundary determination, and provided information to support their contention. Upon examination of that data, our Regional staff agreed that there were inaccuracies in the 1981 field work, and withdrew the entire boundary determination.

Seventy thousand acres of the tract were subsequently acquired by the U.S. Fish and Wildlife Service and the State of Louisiana; therefore, no wetland determination on the entire tract was necessary. A wetland determination on the remaining 40,000 acres, made by the Corps with participation by EPA, delineated on a broad scale 16,000 acres as wetlands subject to regulatory jurisdiction. EPA's Region VI staff plans to continue to participate with the Corps in wetland determinations within the 40,000 acres, as necessary, to refine the jurisdictional boundary lines within smaller and more specific units as individual projects are proposed.

The controversies raised concerning this case serve to illustrate the scientific difficulty in establishing wetland boundaries in bottomland hardwood systems. The regulatory definition centers on the concept of vegetation which is typically adapted for life in saturated soil conditions. In bottomland hardwood cases the vegetation is often facultative, which means it can be found in either wetland or non-wetland circumstances. Because of this, there has been much controversy over how to establish 404 jurisdiction in bottomland hardwoods areas. As illustrated by the Tensas case, differences in approaches can result in discrepancies in wetland acreages involving thousands of acres.

Therefore, we recognized the need for stronger national guidance on this issue, and we are moving to develop it. We issued interim guidance to our Regions late last year and intend to issue final guidance early next year. At this very moment, many respected bottomland hardwood scientists from throughout the Southeast are participating with Section 404 field personnel in an EPA sponsored workshop in Lake Lanier, Georgia to discuss the science of bottomland hardwood systems. This workshop will continue through the week and is the second of three we are holding to develop a sound scientific basis for issuing final EPA guidance for using our regulatory authorities to protect bottomland hardwood wetlands. The other Federal agencies are participating in our workshops, and we hope our joint efforts will promote concensus among the agencies in our approach to this very challenging problem.

We will complete our bottomland hardwoods project later this year and are confident that some of the scientific issues that have created confusion in the past will be resolved. That will be a major step toward an effective and uniformly enforced bottomland hardwood wetlands protection program. We recognize the loss of this irreplaceable environmental resource as a serious problem, and its solution is a very important priority for EPA.

The Subcommittee also requested information on the status of efforts to resolve the differences between EPA and Corps definitions of "fill material." As has been explained during the earlier hearings, the discrepancy between definitions creates confusion regarding the regulation of discharges of solid material into waters of the U.S. for the purpose of disposal of waste. In February, 1984, EPA and Army signed a settlement agreement in NWF v. Marsh which called for a joint proposal for the definition of "fill material" by May, 1984. EPA and Army entered into discussions and a joint proposed definition was agreed to at the staff level. However, Mr. Gianelli, then Assistant Secretary of the Army for Civil Works, was concerned that there was not enough information about the nature and magnitude of these discharges to plan an orderly regulatory program under 404, and objected to its adoption.

The agencies agreed that a study of the extent and nature of these discharges was needed in order to reach concensus on a common definition and notified the Court that additional time would be required. We will this week complete the collection of data from the third and final phase of the study. Within a few weeks EPA and the Corps will compile the data and will proceed to develop our report on the study. We will then be in a position to complete decisionmaking on the joint definition of fill material. The criticism that the "fill material" issue has gone unresolved for far too long is valid. EPA, however, is committed to working with the Army to resolve our differences quickly and to ensure an environmentally effective program to regulate these discharges.

The Subcommittee requested that EPA elaborate upon former Assistant Administrator Cooper's statement that EPA regional offices disagreed with the findings of the Corps over Section 404 permit compliance, and specifically asked for examples of such cases. Ms. Cooper was referring to Corps decisions to issue permits for discharges which EPA believes do not comply with the Section 404(b)(1) Guidelines. The Guidelines, developed by EPA in conjunction with the Corps, contain the substantive environmental criteria which must be met in order for a permit to be issued. EPA advises the Corps on whether or not discharges comply with the Guidelines; however, with respect to its own permit actions the ultimate decision on compliance belongs to the Corps.

Before I cite specific examples, I would like to note that many public notices are for discharges which EPA believes meet our environmental standards, and many other proposed discharges are modified by the Corps in the permitting process to accommodate EPA's environmental concerns. It is the minority of cases in which permits are issued over EPA's objections. Nevertheless, we are very concerned about those cases because of our responsibility under the Clean Water Act to restore and protect the physical, chemical and biological integrity of waters of the U.S. We also consider these disagreements as serious because they often involve issues of interpretation of our environmental standards or matters of precedent that may have significant long term implications for the resource we are trying to protect. The 404(q) Memorandum of Agreement is very important to us as it can provide an effective vehicle for ensuring that disagreements between the Agencies over the environmental acceptability of proposed discharges receive appropriate levels of review. It also ensures these reviews occur expeditiously, and this is also an objective that EPA fully supports.

Regarding specific examples of cases where the Corps has decided to issue permits which EPA believes do not comply with the 404(b)(1) Guidelines, I will mention a few which I believe are representative of these kinds of situations. The Attleboro Mall case in Massachusetts, which Senator Chafee mentioned in the June 10 hearings, is a timely example. The project involves a shopping center, part of which is proposed to be located in a 30 acre red maple swamp. EPA's Regional Administrator for Region I in Boston, Massachusetts, Michael R. Deland, has advised the Corps that the fill does not comply with the Guidelines because of the availability of a practicable alternative site, identified in a study by the Corps, which is acceptable in terms of effects on the aquatic environment. Because the applicant for the Attleboro Mall wetland fill has proposed a plan to mitigate the impacts on the wetland, the Corps recently indicated it intends to issue the permit. EPA has serious concerns about the technical feasibility of the applicant's proposed mitigation plan. Our Boston office is now evaluating whether to pursue the case under the Section 404(q) Memorandum of Agreement or under our Section 404(c) authority.

A second example is a proposal to redike 900 acres of tidal marshes in South Carolina to form an impoundment for duck hunting. After reviewing the public notice, EPA advised the Corps that the project does not comply with the Guidelines because it would cause or contribute to significant degradation of waters of the U.S. In particular, EPA was most concerned with the loss of fish access to important spawning and breeding habitat, and with the reduction in the export from the area of detritus. Detritus is particulate plant matter that forms the base of the estuarine food chain. The Corps decided to issue the permit, and EPA requested elevation of the decision pursuant to the Section 404(q) Memorandum of Agreement. The Army declined EPA's request, and our Region IV staff in Atlanta, Georgia initiated procedures which led to an EPA decision to restrict the use of the site under Section 404(c).

Another matter on which the Subcommittee requested information is the EPA Memorandum of Agreement with the Department of Army under Section 404(q). Former Assistant Administrator Cooper in the previous hearings described the problems we have with the 1982 Agreement, so I will proceed directly to a description of its status. On June 1, 1984, Former Administrator Ruckelshaus provided Secretary Marsh of the Department of Army with six month notice of our intent to renegotiate the Agreement. Negotiations failed to produce a new Agreement within the six months, and the 1982 Agreement expired. However, both Army and EPA agreed to continue to follow the procedures of the expired document until an Agreement acceptable to both agencies was reached. I have met with Mr. Dawson, Acting Assistant Secretary of the Army for Civil Works, several times over the last several weeks and additional negotiations are planned.

Finally we have been asked to provide EPA's views on the extent to which non-navigable isolated intrastate waters are subject to jurisdiction under the Clean Water Act. The simple answer is that all such waters are regulated if their use, degradation or destruction would or could affect interstate or foreign commerce. The more difficult issue is defining the criteria to be used in determining whether or not there is a connection to interstate or foreign commerce, and how such criteria would be applied to individual lakes, ponds and wetlands. EPA does not have general guidance for these determinations, and we believe that developing it would be legally troublesome. It would be virtually impossible to delimit all possible combinations of circumstances which would affect interstate or foreign commerce. We fear that in trying to do so we might overlook some possibilities and inadvertently narrow jurisdiction. Since the legislative history of the Clean Water Act makes clear that Congress intended to extend its jurisdiction to the maximum extent permissible under the Commerce Clause of the Constitution, I am sure you share our concern with this possible outcome.

Nevertheless, I will provide a description of factors which would be considered in making a determination regarding interstate or foreign commerce in these waters, but emphasize we do not consider it to be all inclusive. The following examples are taken from our regulations defining waters of the United States, from our experience with specific Section 404 jurisdictional determinations involving isolated waters, and from case law on this subject:

° waters from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

- waters which are or could be used by interstate or foreign travelers for recreational or other purposes
- waters which are or could be used for industrial purposes by industries in interstate commerce
- waters used as habitat by birds protected by Migratory Bird Treaties. This represents a national interest of very nearly tne first magnitude, as it can be protected only by national action in concert with that of another nation.
- waters used as habitat by other migratory birds which cross state lines
- waters which are habitat for endangered species, to preserve the possibility of interstate movement of persons, such as scientists, who come to a state to observe and study these species
- waters used to irrigate crops sold in interstate commerce

EPA supports application of a rule of reason in applying criteria such as these to the facts of individual cases involving non-navigable isolated intrastate waters. For example, if a class of wetlands generally provides a function which affects interstate commerce, and a particular wetland has characteristics typical for its class, it may not always be necessary to perform studies to demonstrate the particular wetland in question provides that function.

Thank you for the opportunity to provide this additional information on these issues, which we consider to be very important. I stand ready to answer any questions members of the Subcommittee may have on these matters, or any others relating to our Section 404 Program.

OVERSIGHT HEARINGS ON SECTION 404 OF THE CLEAN WATER ACT

WEDNESDAY, SEPTEMBER 18, 1985

U.S. Senate,
Committee on Environment and Public Works,
Subcommittee on Environmental Pollution,
Washington, DC.

The subcommittee met, at 2:30 p.m., in room SD–406, Dirksen Senate Office Building, Hon. John Chafee (chairman of the subcommittee) presiding.

Present: Senators Chafee, Stafford, Symms, and Mitchell.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator **Chafee**. Good afternoon.

I appreciate everybody being willing to return at this time.

This is our fourth oversight hearing in 4 months on the Clean Water Act section 404 dredge and fill program, which is the most important regulatory tool in protecting this Nation's wetlands.

We have been holding these hearings because of the charge and allegations made by private organizations and government officials that the section 404 dredge and fill program is being rendered meaningless through the regulatory reform measures implemented by the Department of the Army's Civil Works.

There has been some evidence, at least in my judgment, from our previous hearings and recent actions by the Army Department that these allegations are correct. In my judgment, it is becoming all too clear that section 404 of the Clean Water Act is not being implemented to protect the Nation's wetlands as Congress intended.

What we have been trying to do in these hearings, in addition to finding out what has been going wrong with the program is to try to induce an agreement, a memorandum of understanding, among the Army, the EPA, and the Fish and Wildlife Service in how to implement the program.

So far, although the parties report that they have strived to achieve this, I think the success has been modest. I would hope that our witnesses today could give us some positive news on the development of a new memorandum of agreement between the respective agencies and the development of a definition of fill material.

At the last hearing, Mr. Dawson did not provide this subcommittee with a clear policy establishing an interstate commerce nexus for isolated wetlands. Despite legal opinions by the Department of the Interior and EPA, which state that the presence of migratory waterfowl is sufficient to establish an interstate nexus, the Army still refuses to assert jurisdiction over isolated wetlands used by migratory waterfowl and still refuses to establish a clear and uniform national policy which would bring isolated wetlands under the program.

The Fish and Wildlife Service estimates there are some 13 million acres of isolated wetlands which could be lost. I might say, incidentally, in connection with the loss of wetlands, many people may think this is an esoteric subject, why should we waste our time on it.

I notice that, not entirely due to the disappearance of wetlands, but in the western flyways that the hunting days are now being decreased. Senator Symms would know more about that than I would. Indeed, it has extended to the eastern flyway, although the eastern flyway people vigorously object, saying that the quantity of birds we are seeing here is not reduced; it is in the midwest and west flyways where the reduced duck population is most obvious.

As I again say, I am not blaming this all on loss of wetlands. There have been droughts out there and a good deal of other problems. But the loss of wetlands has been attributed as being one of the reasons for the decline in the duck population.

The problem is clearly illustrated, and now I am getting back to this interstate nexus that we talked about before and we discussed in our last hearing, by a recent decision made September 4 by the corps' Galveston district office.

As Mr. Dawson may recall, and I mentioned this in our last hearing that was in June, so-called pond No. 12, which is 28 acres in size, Fish and Wildlife found over 50 different species of birds there that were clearly covered but the Migratory Bird Treaty Act. The Fish and Wildlife Service found in January 1984 that pond 12 was being drained. This unpermitted activity was brought to the attention of the Galveston district of the corps. The corps finally responded by stating, "limited use of the migratory species has been determined to be insufficient to establish Federal jurisdiction." How much Mr. Dawson's office knew about this I don't know.

These and other policies advanced by the Army, in my judgment, do not meet the environmental protections called for by the President's Task Force on Regulatory Reform. The task force's mission with respect to 404 was to reduce regulatory burdens, but it was not to compromise the program's important environmental benefits.

I think we have to get that clear. In testimony we had the other day in the Armed Services Committee, the suggestion was that all of this is taking place because of the Vice President's task force on removing regulatory burdens. That task force was directed to remove the regulatory burdens, but not to compromise the program's, that is 404, important environmental benefits.

It seems to us, at least to me, and the others on the committee can speak for themselves, that the environmental benefits have fallen through the cracks when the regulatory reforms have been pushed through.

During Mr. Dawson's nomination hearing at the Armed Services Committee last week, I received a copy of testimony submitted by the National Wildlife Federation, the Bass Anglers, the Environmental Defense Fund, and the National Audubon Society. These are looked on, and rightfully so, as very respectable environmental groups. That is quite a line-up: the National Wildlife Federation, Bass Anglers, Environmental Defense Fund, and the National Audubon Society. They oppose Mr. Dawson's nomination.

The testimony they submitted was a comprehensive documentation of what has gone wrong with the 404 program over the past several years.

[The statement appears at p. 297.]

Senator CHAFEE. In fairness, I would like to submit a letter for the record, which we have here, written to the Acting Director of OMB by a number of organizations, such as the Sand and Gravel Association and others, supporting the reform efforts and complaining to OMB about the Fish and Wildlife Service and EPA trying to win back environmental protections for this program. The letter concludes with an overture to seek further improvements of the program.

[The letter follows:]

September 12, 1985

The Honorable
Joseph R. Wright, Jr.
Acting Director
Office of Management and Budget
Old Executive Office Building
Washington, D.C. 20500

Dear Mr. Wright:

This letter is being sent to express our great concern and opposition to potential Congressional or administrative changes to the Army Corps of Engineers (COE) wetlands dredge and fill permit program under Section 404 of the Clean Water Act that would add delay, complexity, and unnecessary costs to this important Federal regulatory program.

In 1982, the Presidential Task Force on Regulatory Relief (Presidential Task Force) directed that a series of reforms be made to the Section 404 program. The reforms were intended to reduce uncertainty and delay in the permit process, give States more authority and responsibility, expand the use of general permits, reduce conflicting and overlapping policies, and clarify the scope of the Section 404 program. This reform effort was definitely needed and was consistent with Congressional intent as expressed in Section 101(f) of the Clean Water Act which says: "It is the national policy that to the maximum extent possible, the procedures used for implementing this Act shall encourage the drastic minimization of paperwork and interagency decisions procedures, and the best use of available manpower and funds, as to prevent needless duplication and unnecessary delays at all levels of government."

The reforms accomplished to date are commendable. They have resulted in a tremendously improved Section 404 program by expediting the permit process while still maintaining the environmental protection goals of the Clean Water Act. The average time to reach a permit decision has been cut in half -- from 140 days in 1982 to 72 days currently, and we greatly appreciate the efforts your Administration made in accomplishing this result.

At the direction of the Presidential Task Force, needed revisions to the Memoranda of Agreement (MOA) between the various Federal Agencies involved in the Section 404 program have been implemented. Previously, the MOA allowed Federal agencies to utilize four successively higher levels of review of a COE decision on a permit if any parties to the review process disagreed with the issuance of the permit. The revised MOA provide for only one higher level of review when requested by a senior official in Washington and when agreed to by the Assistant Secretary of the Army for Civil Works. This change has put the Corps of Engineers-District Engineer clearly in charge, and has sharpened the lines of accountability and responsibility. Previously, the procedures were so complicated that neither the public, nor the permit applicant, knew where to turn for definitive decisions. Although there are remaining programmatic issues which need to be addressed, permit applicants are now reasonably certain of getting a decision on an application within a reasonable period of time.

Our main purpose in writing you is that the Environmental Protection Agency (EPA) and Department of the Interior's Fish and Wildlife Service (FWS) are seeking reinstatement in the MOA of the automatic four level review process. This would have adverse effects on administration of the program and permit processing. It would delay, increase costs, and in some cases preclude important national projects.

This automatic elevation procedure serves to remove the COE District Engineer from the decision process when one of the resource agencies objects to permit issuance. This translates into additional layers of bureaucracy with the associated paperwork and delays without any realistic expectation of improvements in the quality of the decision or protection of the environment. Additionally, this process would once again blur the lines of accountability and decision making authority often forcing an applicant to accept conditions from all of the various reviewers in order to avoid a delay in permit issuance. One of the most objectionable aspects of the Section 404 program before 1982 would thereby be reinstated.

According to testimony before the Senate Subcommittee on Environmental Pollution, the COE has offered several reasonable alternatives to the automatic elevation procedure to which FWS and EPA have not, to our knowledge, responded. These include regularly scheduled meetings at the Regional/Division level to monitor program implementation and mandatory review at COE headquarters level of any programmatic issues not resolved at the Regional/Division level.

Another significant issue in this context relates to the basis for elevating a permit. The Presidential Task Force specified that elevation should occur only when issues were raised which required national policy level attention, new information was developed which the District Engineer did not consider, or where insufficient coordination had occurred at the field level. The result of this change was that policy level decision makers could focus on technical and environmental issues in the context of national policy. This assures the applicant and the public that all interests are balanced and reviewed at the highest level of responsibility within each given agency.

Now, EPA and FWS want to reverse the decision of the Presidential Task Force and add "environmental impact" as another criterion for elevation. This would result in skewing of the program toward one particular interest without including all of the other important interests such as energy, transportation, defense. or housing. We, therefore, strongly oppose this criterion as a basis for elevation particularly since so many of the laws and regulations are involved in permit applications which specify environmental review.

In recent weeks, the FWS has raised a new issue in the MOA process. They have stated it will be necessary to reach an understanding on a mitigation policy before revisions to the MOA can be concluded. Notwithstanding several objectionable components of the FWS's current mitigation policy, this policy should not be revised because current regulatory mitigation policy for the Section 404 program is contained in 33 CFR 325.4. The existing policy was an integral part of lengthy negotiations among 16 environmental groups, EPA, COE, Department of Justice, and 12 industry groups to settle a lawsuit concerning COE permit regulations, and it was adopted in October 1984 through the Administrative Procedure Act rulemaking process. Any policy change dealing with mitigation would have to be subject to the same notice and public comment rulemaking procedures and cannot be done legally on a bilateral basis between COE and FWS.

We urge you to resist any efforts to undo the Section 404 program reforms. Such initiatives would result in delay and complication of the process. We continue to support the reforms put in place, and are willing to work with the Federal agencies and the environmental community to seek further improvements of this extremely important program.

Thank you for your consideration of our views.

Sincerely,

American Mining Congress
American Petroleum Institute
American Waterways Operators
National Association of Conservation Districts
National Association of Homebuilders
National Environmental Develompent Assocation
National Grange
National Sand and Gravel
National Water Resources Association
U. S. Chamber of Commerce

cc: Lieutenant General Heiberg
Mr. Donald P. Hodel
Mr. Lee M. Thomas

Senator **Chafee**. I made very clear in the testimony before the Armed Services Committee the other day that our discussions on all of this have nothing to do with Mr. Dawson's character, with his integrity, with his competence in his particular field. It has to do with this program and how it is being implemented under his jurisdiction as Assistant Secretary of the Army.

We welcome Senator Mitchell, who has deep concern for these matters, as ranking member of this subcommittee. We would be glad to hear you if you have a statement, Senator Mitchell.

OPENING STATEMENT OF HON. GEORGE J. MITCHELL, U.S. SENATOR FROM THE STATE OF MAINE

Senator **Mitchell**. Mr. Chairman, my statement is largely repetitive of many of the points made in your opening remarks. Therefore, I will ask that the statement be submitted for the record.

I do want to welcome the witnesses here and thank them for their patience and courtesy in coming back again. I do intend to ask questions in the same subject area that I have asked at the previous hearings, with which you are all, of course, familiar, and on many of the issues to which Senator Chafee alluded in his opening statement.

Thank you.

Senator **Chafee**. Thank you, Senator.

[Senator Mitchell's statement follows:]

Opening Statement of Hon. George J. Mitchell, U.S. Senator From the State of Maine

I want to welcome the witnesses to our fourth oversight hearing on section 404 of the Clean Water Act. These hearings have been held in an effort to determine whether section 404 is being properly administered by those agencies and individuals charged with responsibility for the program.

With each hearing, I have hoped to be reassured that the 404 program is being implemented in accordance with, and to the full extent authorized by, the Clean Water Act. The hearings have not provided that reassurance. In fact, the evidence is to the contrary.

For example, at each hearing, I have sought a clear statement of policy from the Army Corps of Engineers regarding its jurisdiction over isolated wetlands. I have asked the Crops what national policy is applied when asserting jurisdiction over isolated wetlands. With no adequate response to this question, I must ask myself how the Corps can properly implement the 404 program with no national policy on so basic an issue.

I will continue to explore the issue of isolated wetlands, and if time permits, other issues at today's hearing. I wish to state in the strongest terms my hope and expectation that progress can be made today in establishing a clear effort on the part of the Corps and other agencies to vigorously implement the 404 program.

I believe that the Clean Water Act is clear on this issue and any confusion regarding the 404 program can be rectified by a thoughtful and well meaning effort to implement the law.

Senator **Chafee**. We want to welcome another distinguished member of this subcommittee, Senator Symms. If you have a statement, this would be a proper time for it.

OPENING STATEMENT OF HON. STEVE SYMMS, U.S. SENATOR FROM THE STATE OF IDAHO

Senator **Symms**. Mr. Chairman, I will have some questions at the appropriate time. I am delighted to have our three witnesses here. I would like to move ahead with the hearing.

I am hopeful that they will be able to work out all of their problems with the memorandum of understanding because, in the general thrust, I think that regulatory reform is a good thing and that we need to see that we do make it work and reduce the burdensome bureaucracy that so many people have to contend with in this day and age. I think that I will just reserve my time for questions.

Senator **CHAFEE**. All right, Senator Symms. Thank you very much.

Again I thank you gentlemen for returning and apologize for the half-hour delay that occurred. What we would like is a progress report of how you are doing. Why don't we start with Mr. Horn, who is the new Assistant Secretary for Fish and Wildlife and Parks.

You were here for your confirmation hearing in July, in which you strongly supported including resource concerns as grounds for elevation under the memorandum of agreement. How are you doing with all of this? Then we will go right through and ask the same question of the other witnesses.

Go ahead, Mr. Horn.

STATEMENTS OF WILLIAM P. HORN, ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR; ROBERT K. DAWSON, ACTING ASSISTANT SECRETARY OF THE ARMY, CIVIL WORKS; AND RICHARD E. SANDERSON, ACTING ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS, ENVIRONMENTAL PROTECTION AGENCY

Mr. **HORN**. Thank you, Mr. Chairman. I wonder if I might just add a couple of quick opening observations.

As indicated during my confirmation hearing before this committee, I committed my own personal attention to this particular program because of the importance of maintaining our wetlands due to their critical contribution to our fishery and wildlife values.

We know that we are losing wetlands at an unacceptable rate and we need to stem those losses. Fortunately, we are seeing a growing awareness throughout the country not only regarding the importance of maintaining our wetlands but also concerning conservation practices.

We see this concern extending toward other areas of congressional activity, such as the farm bill, where conservation measures are aimed at stemming wetland losses. Unfortunately, as we know, 80 percent of the losses of wetlands is due to agricultural activity, so we are looking for some progress there.

Because of the attention and priority I have attached to this exercise, Mr. Dawson and I have been meeting on a weekly basis during the past 3 weeks. We are personally handling the negotiations between our respective agencies. I expect to continue to meet with him on a weekly or more frequent basis until we have this resolved.

The objectives that we are seeking, of course, are to resolve the outstanding issues involving the memorandum of agreement and, in addition to that, to ensure that the important concept of mitigation is given the proper consideration by the Corps of Engineers and adequately built into the program related to permit issuance.

We see mitigation as the key element to ensuring that wildlife values are given their proper consideration.

Regarding the MOA, of the five issues that have been identified, three have been resolved. The Acting Assistant Secretary and I have been sharing ideas and meeting personally on methods and approaches to resolve the remaining two.

I wish that I could tell you that we had them finally worked out. We do not yet. But I have been very pleased with the cooperative spirit, and I think we are engaging in a good-faith effort. I am hopeful that based on our three meetings to date, and the ones we have scheduled in the future that resolution is achievable in the very near future.

I add this because I think our differences in many respects have been on the margin. Out of the approximately 10,000 permit applications that the corps handles, the problems we have had, and there have indeed been problems, have been limited to somewhere in the vicinity of 30 permits. Given the type of magnitude of these problems, I am convinced that our remaining differences can and will be settled to our satisfaction. Thank you.

Senator **Chafee**. We are delighted that the chairman of the full committee is here. He is having a full menu these days with Superfund on the floor, and that seems to be on somewhat of a rotating business; Superfund one minute and Immigration the next minute.

Are we on Immigration or Superfund these days on the floor?

Senator **Stafford**. Mr. Chairman, it is changing so fast, you almost need a scorecard to tell which is which. But I can tell you that we were on Superfund from 1:30 to 2:30. We are back on Immigration from 2:30 with a vote at 3:30. And what happens after that nobody has decided.

But it is my hope, and this is a matter, I guess, of only casual interest to our guests here, that we may be back on Superfund by 4 and be able to stay there for a couple of hours.

Senator **Chafee**. Do you have a statement you would like to make, Mr. Chairman, at this time?

OPENING STATEMENT OF HON. ROBERT T. STAFFORD, U.S. SENATOR FROM THE STATE OF VERMONT

Senator **Stafford**. Thank you, Mr. Chairman. I would.

I am pleased to join you at this important hearing and to share with you and our witnesses my intense frustration, frankly, over the subject of this hearing.

What frustrates me is the inability of the Department of the Army to enter into a memorandum of agreement with the Fish and Wildlife Service and with the Environmental Protection Agency over how to effectively operate the section 404 program.

Unless there is such an agreement, I am concerned that decisions made on development in wetlands will not adequately reflect the environmental requirements of the Clean Water Act.

Such an agreement must allow, in the judgment of this Senator, on environmental grounds, that EPA or the Fish and Wildlife Service be able to elevate decisions to higher authority in Washington.

With respect to other issues that were raised in these hearings, there must be a resolution on the definition of what constitutes fill material, and there must be a decision over the issue of isolated wetlands to assure that the Department of the Army includes, within the scope of the 404 program, wetlands used by migratory species.

Personally, I can't see why these issues have not been resolved in a fair and balanced manner thus far. A manner that reflects not only the letter of the law but the intent of Congress in writing the law. Until they are, I will be willing to join you here, Mr. Chairman, to sit through a 5th hearing, if that proves necessary, and even a 10th hearing, if that proves necessary and we ever conclude Immigration and Superfund.

Senator **Chafee**. Mr. Chairman, those of us who are used to sitting through long hearings, we have been on, I think, Immigration for at least the past 4 years, so 10 hearings on an MOA between the Army and the Corps of Engineers would be nothing. But I hope it doesn't come to that.

Why don't we hear from each of the gentlemen. Mr. Dawson, do you have any particular statements you wish to make on how progress is coming?

Mr. **Dawson**. Thank you, Mr. Chairman. I would like to make a brief informal statement, partly in response to some of the points that have already been made.

This administration and the Army recognize the importance of water resources, especially including wetlands. Army has consistently supported legislation and policies which would provide needed protection for these resources.

Along these lines, I believe the regulatory programs of the corps are in good shape and are accomplishing the statutory goals.

The Army's regulatory program is by nature a very controversial one. The Congress gave the corps the very tough and very unenviable task of balancing strong competing interests on thousands of permit applications annually. We have been very sensitive to the very legitimate concerns raised at hearings of this subcommittee. I am actively working with Mr. Horn and Mr. Sanderson to resolve the issues raised.

These sessions, and there have been many of them at the staff level and at the Assistant Secretary level have been marked by constructive, positive negotiations. We have resolved the issue of jurisdiction in isolated wetlands and are on track for the January 1986 resolution of the definition of fill material.

I might, Mr. Chairman, because you emphasized your concern just a moment ago about isolated wetlands, emphasize again that there has been no change in the Corps of Engineers' approach to isolated wetlands as part of the regulatory reforms or any other aspect that I am aware of. I believe Mr. Sanderson will address that issue in much more detail in a moment.

We are also making good progress on the memorandum of agreement. The issues involved are not simple ones, as I think everyone is aware, and have taken longer to work out than any of us would have liked.

Regarding mitigation, I provided our detailed, current practice to Mr. Horn for his review. I welcome his response and comment. He and I, as he has already pointed out, have been meeting weekly and we have other meetings scheduled.

Finally, I would like to emphasize that the regulatory reforms that the Army is implementing are completely consistent with all laws, regulations, and the charter of the Presidential Task Force on Regulatory Relief.

The reforms are a result of the overwhelming outcry from the regulated public. My experience is that these individual homeowners, landowners, and businesses by and large realize that environmental safeguards are important and must be maintained. However, the delays and uncertainties in the program prior to reform were unacceptable.

The applicants now know that the Army is the decisionmaker and understand the important role of the resource agencies in the program.

Army's reforms are centered on getting a decision to the applicant in a timely way with as little duplication as possible. But as you have pointed out, Mr. Chairman, that must not be done at the expense of the environmental safeguards.

The directive to bring about these reductions in duplications and overlap is a specific requirement mandated by the Congress in sections 101(f) and 404(q) of the Clean Water Act, as well as the Presidential Task Force on Regulatory Reform.

Environmental safeguards were never a target of the reforms and have not been reduced. In fact, reforms have had the beneficial effect of greater public acceptance and greater voluntary compliance, which is essential to the success of the program.

As you pointed out again, Mr. Chairman, lastly, let me say that the task force did in fact instruct us not to compromise environmental benefits. I would disagree with your conclusion that those environmental safeguards have fallen through the cracks. We believe that we have been very careful to execute our reforms without that undesired and unacceptable side effect.

Thank you very much.

Senator **Chafee**. Thank you, Mr. Dawson.

Mr. Sanderson?

Mr. **Sanderson**. Yes, Senator. I do not have a prepared statement. I would like, however, to bring you up to date on two questions which came up during the last hearing with you.

One, is the question of where we are in terms of working with the corps to reach a memorandum of understanding. We have continued to work with the corps. Mr. Dawson and I have met this past summer a total of eight times: six times in his office in the Pentagon, twice over in my office. We have reached an accommodation on each of the outstanding issues except for the elevation issue, where I think there is an honest difference of opinion between the two agencies.

It is a tough question. Our people in the field continue to work with each other, but that issue has not been resolved at the national level.

The other question that Senator Mitchell specifically asked me to clarify was EPA's position on isolated wetlands. We forwarded to you a statement which clarifies that position. If there are any questions on that, I would be glad to answer them.

Senator **Chafee**. Let me just ask Mr. Dawson a couple of questions, if I could.

First of all, on the isolated wetlands. In my judgment, there is no case where the Government has asserted jurisdiction based upon the Migratory Bird Act that has declared that the Government does not have jurisdiction over that wetland. We went through this last time. I believe you reached the same conclusion I did. Is that right, Mr. Dawson?

Mr. DAWSON. I didn't hear all of the basis of the statement, Mr. Chairman.

Senator CHAFEE. It is my judgment that there is no case where the Federal Government has asserted jurisdiction based upon use of the isolated wetlands by migratory fowl where the court has not found that the Federal Government did not have jurisdiction. In other words, they found the Federal Government did have jurisdiction that it asserted over that isolated wetland.

Mr. DAWSON. Mr. Chairman, I would agree with that statement. I think when the statement came out before in an earlier hearing, and it might be worth clarifying, the statement was a broader one, that no court had ever circumscribed the jurisdictional reach of the corps.

Of course, we are wrestling now before the Supreme Court on the *Riverside Bayview Homes* case. But the statement as you rendered it I don't have any disagreement with.

Senator CHAFEE. If that is so, then why isn't that an adequate definition for the corps to assert the interstate nexus? What more do you need?

Mr. DAWSON. Mr. Chairman, as a practical matter, as I understand it, and let me say again that I believe that all three agencies have been in the past and continue to be in agreement on the standard that we apply, but as I understand where the problems come up in the field are in making a decision on how much use by migratory waterfowl there has been and at what point that reaches the cutoff of interstate nexus. Some rule of reason has to be applied by the decisionmaker in the field, even when that statement you just made is enunciated.

Senator CHAFEE. The problem, as I understand it, though, is that you don't give guidelines or direction, as it were, to your people in the field in these matters. For all they know, this might be something that they don't even have to deal with.

Have you instructed your people that if the isolated wetland is used by migratory birds, to any extent, that they indeed do have jurisdiction?

Mr. DAWSON. I believe that the field operators for the corps understand that to be the case, Mr. Chairman. I have not enunciated from my office. I believe the Office of the Chief of Engineers has given some guidance to the field.

I think beyond a general statement, as the one you have enunciated, I don't believe that those of us in Washington are capable or should try to be more specific than that.

Senator CHAFEE. Now let's turn briefly to the elevation based on the impact on Fish and Wildlife resources. I just don't understand all the problems here. As I understand, the elevation is that the Fish and Wildlife people can say to you, "We request that this be brought forward to your attention." Not to them, to you. That is what elevation is all about. Correct?

Mr. DAWSON. Yes, sir.

Senator CHAFEE. It is brought up to you based upon the impact on the Fish and Wildlife resources. I must say, I am bedazzled as to why that doesn't make sense. Obviously, the thrust of that power would be that they try and get these things settled at a lower level. You don't want to be bothered with 25 elevations. Fish and Wildlife doesn't want to be pestering you with all kinds of elevations. But they look at these actions on the lower level and see this is impacting to a deleterious extent on Fish and Wildlife resources. So they say, "OK, let's get that straightened out or we will elevate it."

It seems to me there are plenty of restraints in that. The restraint is if they elevate everything to you, you are going to get angry with Fish and Wildlife and it isn't going to strengthen their hand; whereas, on the other hand, if they have a strong case, something has gone wrong, your people aren't perfect down below, they elevate it, then indeed it comes to your attention, and you can give it your thorough consideration. Now, what is the matter with that?

Mr. DAWSON. Mr. Chairman, you and I have discussed this before, both in this setting and in one-on-one conversations. That has caused me to give a great deal more thought to that concern because I think it is a very legitimate one.

The three grounds that we now have specified by the Presidential Task Force on Regulatory Relief—very specifically stated that have been embodied in the MOA, I believe if proper understandings are reached, for each one of those three—can reflect environmental concerns.

As you recall, the three grounds now are some new information that was not available below, and certainly that could include and should include concerns over environmental matters that come to our attention late. Another ground is issues of national importance. Certainly that encompasses environmental concerns. Where I think we can do much more, though, to accommodate your concern is the third ground, which is what we call insufficient coordination between the district engineer and his counterpart from the other agencies. That is where I think most, if not all, of the kinds of things you have in mind would be captured.

In other words, I believe the concern would be that there is an environmental injury that the other agencies perceive and are worried about, that they feel the district engineer has not adequately responded to, has not adequately reflected. And I believe that if we can elaborate on the three existing bases, and that is really the best approach because the Presidential task force was very specific about them, especially the insufficient coordination one—and I have given my colleagues some initial thoughts on how we might elaborate on that insufficient coordination criteria—to enable the kinds of concerns that I believe you have in mind to be identified, I submit to you that is exactly the kinds of things that have already been coming up in the roughly 50 percent of the elevations we have been granting. They have been environmental concerns.

But I agree with you that we probably need, no doubt, need to give better assurance that that sort of concern has a means of getting review, and it is appropriate to do so.

Senator **Chafee**. I don't want to contradict whatever you said. I know that those three grounds are there. They have been there. But Mr. Arnett found them inadequate.

It seems to me that you could meet every one of those requirements. There could be adequate coordination, there could be no new facts, and I forget what the third one is. And it is pretty hard to say 40, 50, 100 acres of wetlands is national policy.

You can meet every one of those. An honest person would say, "I can't have this elevated to the Assistant Secretary, to Mr. Dawson." Therefore, I just don't understand the resistance to the fourth ground of projected impact on Fish and Wildlife resources.

Mr. **Dawson**. Mr. Chairman, again I believe you have a point there, and I believe we can make those three, by some additional discussions and additional agreements, reflect better that concern.

What we are faced with as administrators, though, is the very difficult fact of administrative life, that as we go higher in the chain of command, the decision isn't going to get any better, unless we find one of these three criteria is met. In other words, in all three of our agencies, the technical and scientific expertise is down at the lowest level.

I think we need to be sure that what we do will give the public and you and others interested in this the best possible decision. I am not sure that in all cases going higher up the chain will produce that. So that is why we are trying to put some constraints on this, as you have indicated we should, but respond to your very legitimate concern at the same time.

Senator **Chafee**. You haven't persuaded me, but my time is up. Senator Mitchell?

Senator **Mitchell**. Thank you, Mr. Chairman.

Mr. Dawson, I think it is important to go back and put this issue of jurisdiction over isolated wetlands in proper perspective because I must say, candidly, I disagree w1th the test, which you have suggested this morning, that should be applied.

I have been over this before, but I would like to take a moment because I think in fairness to all of us we ought to understand the perspective with which we are dealing.

In 1975, in the case of *Natural Resources Defense Council* v. *Calloway,* the court held that Congress in enacting the 1972 amendments had, and I now quote the court, "asserted Federal jurisdiction over the Nation's waters to the maximum extent permissible under the Congress clause of the Constitution."

I believe you are familiar with that. I have read that to you at previous hearings.

Mr. **Dawson**. I am very familiar with it.

Senator **Mitchell**. The court there found the corps regulations implementing section 404 were too narrow and directed the corps to publish new regulations clearly recognizing the full regulatory mandate of the act.

That culminated in the publication of final regulations in 1977, which, as you know, defined waters of the United States to include all waters, the degradation or destruction of which could affect interstate commerce.

In 1981, the so-called Regulatory Reform Report by the task force headed by the Vice President was issued, and based upon that, the corps has taken a view of jurisdiction that in my judgment is narrow and clearly inconsistent with the law.

In a variety of circumstances, unrelated to this particular area, the Supreme Court has held repeatedly that the power of Congress under the commerce clause is not limited to instances in which an individual occurrence has a significant effect on commerce but is, in fact, much broader than that.

Congress' power to regulate includes acts which may, in isolation, be deemed parochial or local but which, either indirectly or in the aggregate with other similar acts, have a national effect.

In the Utah case, with which you are familiar, I know—we have discussed it at great length—the court of appeals for the tenth circuit upheld the corps' jurisdiction over a lake in Utah. In that case, the court said, paraphrasing the Supreme Court language, and I now quote the tenth circuit, "The triviality of an individual act is irrelevant so long as the class of such acts might reasonably be deemed nationally significant in their aggregate economic effect."

If you read those two lines of cases in conjunction, you must conclude, applied to this particular situation, that the Army Corps of Engineers has jurisdiction over isolated wetlands, irrespective of whether they are actually used by migratory waterfowl, so long as they could be used.

Indeed, the Environmental Protection Agency, as Mr. Sanderson just referred to, in a letter which he signed to me dated September 18, states explicitly, and I quote him now from the letter referring to an enclosed memorandum, "As the memorandum states, if evidence reasonably shows that the waters are used or would be used by migratory birds or endangered species, it is covered."

So your comment that you have to determine how much use there has been and of a particular isolated wetland, or that there must be a rule of reason, and the recent decision by the Galveston District—I have before me in that regard a letter dated September 4, 1985, in which jurisdiction was denied on this basis, and I quote that letter, "The limited use of a water by migratory species and interstate travelers has been determined to be insufficient to establish Federal jurisdiction," and that is a quotation from the letter—indicate that there is either a fundamental misapprehension of what the law is or, if there is an understanding, a clear disagreement on that point.

So my question to you now is, do you agree that the law, as I have described it, states that if these areas could or would be used by migratory waterfowl—no actual evidence of a specific use, that someone saw waterfowl using this pothole at a particular time—is sufficient to establish jurisdiction, or is it your position that you don't agree with that interpretation and that you think that there has to be some demonstrated actual use?

I know you don't agree with what I am saying. I am trying to get at what is the basis for the manner in which you are operating.

Mr. DAWSON. I would be glad to answer the question, Senator, if you would like. I do agree with your interpretation of the case law that you mentioned. I was privy to the letter that Mr. Sanderson sent to you and fully endorse it as the position of the administration, not just of EPA.

The only thing you have stated that I would take issue with did not involve the interpretation of the case law but what I believe was your statement that the reforms in 1982 actually somehow endeavored to change the corps' and the Army's interpretation of how we treat isolated waters.

It would be very helpful to me to know how it is felt that was done because it was certainly not our intent at any point. As you know, the Presidential Task Force on Regulatory Relief directed us to clarify the jurisdiction. It did not indicate anything to do with isolated waters. And again, to my knowledge, we have not taken any steps to try to roll back or expand or change that in any way.

I think the rule of reason that I alluded to before and the use by migratory waterfowl certainly is one way of establishing jurisdiction, beyond question. It is not the only way, as you have very clearly pointed out.

So again, as far as I can say, I have no disagreement with the way you interpreted the case law and the way that law ought to be applied.

Senator MITCHELL. Then would you agree that the decision by the Galveston District, to which I have referred, incorrectly applied the standard which we now mutually agree is the existing standard?

Mr. DAWSON. Senator Mitchell, I am not familiar at all with that case. I wish I knew all of the details. I would be pleased to look at it quickly and answer that for the record. Until I had a chance to do that, I think it would be unwise to try to answer.

Senator MITCHELL. That is fair enough.

[The information requested follows:]

commerce"; 33 CFR 323.2(a)(5), 42 Federal Register 138 page 37144). The Corps has traditionally taken a reasonable approach to what constitutes an affect on interstate commerce. This, I believe, is what Mr. Sanderson referred to at the July 15, 1985, oversight hearing, when he said the "rule of reason" should be applied to interstate commerce calls. Finally, when Galveston District made the jurisdictional determination on Pond 12 they were applying the cumulative impact test noted in EPA's September 12, 1985, legal memorandum. That is, the pond is not considered to have the "characteristics" of a water the individual or cumulative use degradation or destruction of which could affect interstate commerce.

Unfortunately, the Galveston District used terminology in their letter to the U.S. Fish and Wildlife Service that described the use by migratory birds and endangered species as "limited" and not "substantial." In fact, I am informed that the occurrence of migratory birds and endangered species was so trivial, that the District did not believe there was an effect on interstate commerce.

Nothing has come to my attention indicating any instances of contravention of laws, regulations, or guidance on this specific jurisdictional determination. Let me reiterate that this Administration has done absolutely nothing to change, in any way, the limit of Section 404 jurisdiction of the Clean Water Act.

Sincerely,

Robert K. Dawson

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

11 OCT 1985

Honorable George J. Mitchell
United States Senate
Washington, D. C. 20510

Dear Senator Mitchell:

This is in response to your request for a review by my office of the jurisdictional determination made by Galveston District on "Pond 12." We do not intend, and I do not believe you requested us, to perform a legal or formal review, but rather a general overview as discussed on September 18, and during previous oversight hearings. Let me say at the outset, as I have during the oversight hearings, that this Administration has not changed, in any way, policy on determining the limit of Section 404 jurisdiction.

Pond 12 is a 30-acre pond on agricultural land located approximately 60 miles from the Mexican border. This is a type of pond which the Galveston District believes does not and could not support use by migratory birds, or endangered species the alternation or elimination of which could affect interstate commerce. Furthermore, the District determined that Pond 12 still could not support such use when considered cumulatively with potential impacts on other areas including those sharing its characteristics. Therefore, the District did not exert regulatory jurisdiction under Section 404. The Galveston District assures me that they do exert jurisdiction over many isolated waters that support use or could support use by migratory birds or endangered species the alteration or elimination of which would affect interstate commerce.

This jurisdictional determination is consistent with our regulations and the September 12, 1985, EPA legal memorandum. The Corps has been making jurisdictional determinations on isolated wetlands in the same way since publication of our 1977 regulations. The "could be used" criterion has been an integral part of our regulations since 1977 (i.e. "the degradation or destruction of which could affect interstate

Senator **Mitchell**. Let me say that I feel this whole process has been worthwhile by virtue of the fact that you have stated very clearly your agreement with the standard to be applied in these circumstances. I would urge you to put that in writing and circulate it to the various districts and divisions who have to make these decisions with respect to specific circumstances so that they can be aware of what the standard is that they must apply under the law, and that is what the legal standard is that they must utilize in making these decisions. I think that is very, very helpful.

Mr. **Dawson**. Thank you, Senator Mitchell. One approach to that would be the letter you received from Mr. Sanderson, which I think lays it out. This is one of those subjects that every time you change a comma, people feel you are trying to change more than perhaps you are.

Senator **Mitchell**. That is a problem in dealing with a bunch of lawyers here on the committee and everywhere.

Mr. **Dawson**. There are at least two sitting at the table now, I know.

Senator **Mitchell**. There are two up here.

Mr. **Dawson**. We would certainly be pleased to take that letter and make it known.

Senator **Mitchell**. I wish you would do that. I would like to ask, and I think that is a fair request that you want to familiarize yourself with the Galveston situation, to which I referred. But it appears rather clear that the maker of the decision there was under the impression that in order for jurisdiction to be established, there had to be an actual demonstrated use by migratory waterfowl of the particular subject of inquiry.

The point I am making to you, and which you agree with, is that there need not be that actual use demonstrated, or obviously, if actual use were demonstrated, that strengthens the jurisdictional case, but it is not a necessary prerequisite for jurisdiction to be established.

I see my time is up. Thank you, Mr. Chairman.

Senator **Chafee**. Thank you, Senator.

Senator Symms?

Senator **Symms**. Thank you, Mr. Chairman.

I thank all three of you for the effort that you have made in putting this together to try to get that resolved.

Mr. Horn, did I understand you correctly to say that you have worked out the alternative controls so that your agency no longer insists on automatic elevation? Is that what you are saying?

Mr. **Horn**. No. We are still looking at the particular issue of automatic elevation. It is one of the outstanding points of disagreement.

What I am trying to do, based on my personal background in negotiations when the parties reach difficult points, is to seek alternative means that permit us to achieve the same basic objective. Of course, the purpose of the elevation is to ensure that the decisionmakers in the corps provide appropriate review and consideration pursuant to the Fish and Wildlife Coordination Act of the environmental factors and values of any particular permit application.

If we can achieve some other way of ensuring, expressly, that the corps gives the appropriate consideration to the FWCA, then we are prepared to look at alternatives to automatic elevation.

So the key is to achieve that purpose of full and fair consideration. If we get that, we are prepared to look at alternatives to automatic elevation.

Senator **Symms**. Mr. Sanderson, are you still asking for automatic elevation?

Mr. **Sanderson**. We have discussed any number of ways that we can also reach accommodation as Secretary Horn is doing. However, automatic elevation at some level, rather than depending on a informal agreement, seems to us to be absolutely essential, particularly at the EPA regional corps division level. We believe decisions can best be made with the technical and scientific capabilities in the field.

Senator **Symms**. Is automatic elevation, though, the key problem between your agency and the corps?

Mr. **Sanderson**. That is correct.

Senator **Symms**. Is that just because each agency wants to avoid taking the heat?

Mr. **Sanderson**. I don't think so, sir. In those instances where we have not elevated or have not been able to elevate we have initiated more 404(c) actions. I think most of these 404(c) actions could, quite frankly, be resolved if we had a better 404(q) capacity.

Senator **Symms**. You do have the appeal right, under 404(c), to overturn each and every one of the corps permits.

Mr. **Sanderson**. Of course.

Senator **Symms**. Did not the Presidential task force instruct the EPA and other agencies to avoid that automatic appeal?

See, I come back to that original question again. It is like everybody is trying to avoid taking the heat.

Mr. **Sanderson**. No. When Bill Ruckelshaus rejoined us, we worked with the existing 404(g) MOA for over a year. It was decided that the whole issue needed to be reopened becuse EPA's ability to carry out its side of the 404 program needed to be reviewed. In Mr. Ruckelshaus letter to Secretary Marsh, he reopened the three issues of elevation interim level review, environmental criteria and automatic elevation.

Based on the Ruckelshaus' letter EPA has raised five issues with the corps including the elevation issues mentioned. We have reached general agreement on all of the issues except the two issues of elevation. With respect to automatic elevation, we had offered to accept automatic elevation at the regional level, and would not need to be as adamant on the national level. However, we are now looking at other options on that particular point.

I think really, and on behalf of Secretary Dawson, he has given it a real effort. He has been available to us every time the negotiations have called for a face-to-face meeting.

Senator **Symms**. This is a question, perhaps for all of you. I understand, if I heard all of this correctly, that the corps has yielded on three of the five issues that were under renegotiation.

Mr. **Sanderson**. We have reached accommodation on three of the five issues. I find it difficult to say which one of us is in a yield position or which one of us is in a win position in this situation.

Senator SYMMS. How would you put it, Mr. Dawson?

I don't want to do anything to dampen the spirit of negotiation here.

Mr. DAWSON. I think it is clear that the Army has yielded on the three issues we have resolved so far. But I think rather than characterizing it as wins or losses, I think, as your question suggests, the better way to characterize it is that we are working together now a lot better and in a lot more cooperative way to try to resolve these issues.

Senator SYMMS. I know you have undergone a lot of criticism over this period, and some have accused you of having tried to dismantle the 404 permit program, and so forth. Hearing your opening remarks, it didn't sound like that to me.

Would you care to respond to that any more? Do you think you have adequately covered that?

Mr. DAWSON. Sir, just to say again that I don't think the evidence is there that there has been any dismantling. I believe if you chose any member of the regulated public at random or any sample thereof, they would tell you that you are crazy if you said it had been dismantled because they are still struggling with a very tough regulatory program. So I think the facts are that there not only has been no attempt to dismantle the program, but there certainly has been no success or any accomplishment of that.

Senator SYMMS. You have not agreed to, if I understand it correctly, making environmental concerns the reason for elevation. Is that correct?

Senator CHAFEE. See if I can understand this. This covers both the request from EPA and the request from Fish and Wildlife? Is that what your question applies to?

In other words, just to get so we understand the question here, Fish and Wildlife has requested that there be elevation based on environmental grounds.

Senator SYMMS. Right.

Senator CHAFEE. That has not been agreed to. Let me just finish. EPA has made the same request, although EPA's request is sort of a double one. One, that they require the corps to review a permit when requested, that is the corps, which is the same thing as I mentioned on the Fish and Wildlife, and allow permits to be elevated on environmental grounds. I am not sure exactly what the difference is. But in other words, both groups, EPA and Fish and Wildlife, have asked you to enter into a memorandum of agreement in which permits will be elevated to you based on the projected impact on Fish and Wildlife resources or environmental grounds. Is that a fair definition of the request of you, Mr. Dawson?

Mr. DAWSON. You are referring to the recent attempts to change the MOA?

Senator CHAFEE. Right.

Mr. DAWSON. I think that is a fair expression.

Senator CHAFEE. That is why we are here. We are here on the MOA.

Mr. DAWSON. That is exactly correct.

Senator SYMMS. What I would like to hear is why would you not like to use environmental reasons. Why don't you say why.

Mr. **Dawson**. Yes, sir. One thing to keep in mind is that the Presidential Task Force on Regulatory Relief very specifically set out the grounds that we would use for elevation.

In the discourse I had with the chairman earlier, the point I was trying to make is that I believe within those three, with some additional discussions and agreements, we can accommodate the environmental concerns. Of all of the 30 or so elevation requests that we have had in the 3 years this has been in operation, every single one of those was based on environmental concerns. The question was, Does that further fit one of the three criteria?

All 12,000 of the permit actions that we have handled each year have environmental concerns about them. So we have to find some administrative way to get to the most important cases. I think we can do that within the parameters.

Senator **Symms**. What environmental protections are still in the program then?

Mr. **Dawson**. Again, I think any concerns that rise to the level of a national issue, No. 1, would automatically be covered. Any other environmental concern where the district engineer, to use the words of the criteria, failed to give sufficient coordination and failed to listen fully and fairly to the views of the other agency. That could cover any scope or any size of environmental concern.

The law says, though, that if the district engineer listens fully and fairly, then it is his responsibility to make the decision. Basically those are the various points that I think we have to determine.

Senator **Symms**. Have we reduced the amount of mitigation that is required in this permit decision process under regulatory reform?

Mr. **Dawson**. No.

Senator **Symms**. We have not?

Mr. **Dawson**. No.

Senator **Symms**. Thank you, Mr. Chairman.

Senator **Chafee**. Mr. Dawson, I am not sure that I am familiar with the law where it says if the district engineer listens fully and fairly, that the decision is his. Isn't that what you just said?

Mr. **Dawson**. That is exactly what I said, yes, Mr. Chairman.

Senator **Chafee**. That is the law?

Mr. **Dawson**. It certainly is my judgment that that is the law.

Senator **Chafee**. Therefore, it would be against the law to have elevation?

Mr. **Dawson**. No, sir. I am saying that what the law requires is that the district engineer give full and fair consideration to the views of the other agencies. If he fails to do that, and I believe that is what this committee has indicated in the past, too, then that needs to be reviewed and there needs to be assurance that full and fair consideration has occurred. If this has not occurred, then the program is not working as it should.

Senator **Chafee**. I don't myself envision the law as being that way. It seems to me that there are instances that could take place that are not of a national scope. Forty acres of land in Pulaski, MS, being filled is important, it is a wetland, but those 40 acres are not going to affect the Nation. So you can't come up on that basis.

Second, the man who listened to it may have listened very fairly to everything. It is just that he came out with what EPA or Fish and Wildlife thought was a wrong decision, absolutely wrong.

Now, you are saying that is tough luck. If those two requirements are met, that is enough and the door is shut. If one of these gentlemen makes sure that you take the trouble to take a look at this, and we have to stick by what I said before, they are not going to harass you over every nickel and dime thing because obviously it is not going to get anywhere, but a certain matter they feel is important should come up, then how do they do it? They can't do it under the memoranda of understanding that now exist.

Mr. **Dawson**. Mr. Chairman, I believe they could, again because if they are right, if there is an environmental loss here that is not commensurate with the benefits arising with the public interest review, then their assertion, it would seem to me, is there has been insufficient coordination at the lower level. There was not a full and fair hearing.

Obviously, at some point somebody has to make the decision, and there may not be an agreement ultimately, completely, between the two agencies. But I would submit to you that the mechanism is there.

I do believe we need to expand on what we mean by insufficient coordination, and that is what I was trying to say earlier, that I have suggested to my two colleagues that we take a look at, to give them more assurance that when they have the kind of scenario you just outlined, that they w1ll have a mechanism to bring it up.

Senator **Chafee**. Well, you are sure digging in your heels. Somebody mentioned you can use the 404(c) procedure. Well, that is a draconian procedure. It wasn't you. I think Senator Symms touched on that.

Sure, that is a case of last resort which I don't think the Administrator has ever used, has he?

Mr. **Sanderson**. We have initiated 10 cases using section 404(c), 9 of those have been initiated as a result of our inability to resolve the elevation issues and develop a new MOA.

Senator **Chafee**. That is a tough way to have to proceed. That is a very major intercession that I think is a last resort, which is now becoming too frequent apparently, judging from what you are saying.

What do you have to say, Mr. Sanderson, on what Mr. Dawson is saying about how to elevate?

Mr. **Sanderson**. It seems to me that the issue is one of cumulative effect, similar to Senator Mitchell's opinion regarding application of the Commerce clause, to insolated wetlands usage. Many of the issues in dispute, I believe can be resolved. There has been disagreement between the two of us. I believe these problems can be resolved between the regional director of EPA and the corpe division engineer.

We have tried a number of different mechanisms to resolve the problem without calling it an elevation, but we then get back to management of the problem based on the particular individuals involved rather than by a formalized mechanism. I beli[illegible] that we need some type of a recognized mechanism to elevat[illegible]at is the position of my Administrator and that is the position we have taken in our discussions with Mr. Dawson.

Senator **Chafee**. That is the position I take, too. We find Mr. Dawson's heels are dug in here. I just don't think the solution is a broadening of the failure of consultation or the broadening of the basis to elevate because it is of national significance.

What are the terms of national significance? I don't know what is of national significance. Is Westway something of national significance? Is South Adelboro something of national significance? Is this Pothole 12 in Texas of national significance?

I don't think we can say that in honesty. After all, we want these things done, not people cutting corners in order to get something elevated. I think we want it on a very honest basis. It would be pretty tough for people to say that these things are of national significance. If you add them all together, they are nationally important, but by themselves, what harm? Fill in 200 acres of wetlands. It is not going to harm the Nation. It is terrible, but no one could swear that this is of national significance.

I think you have opposed things being elevated. That is what you are doing, Mr. Dawson, in my judgment.

Mr. **Dawson**. Mr. Chairman, you have characterized my position as digging in my heels.

Senator **Chafee**. This is our fourth hearing on this, Mr. Dawson.

Mr. **Dawson**. Yes, sir. But I do believe we have made some very positive headway. I want to note again that the Presidential Task Force on Regulatory Relief charter, under which all three of us are operating today, very specifically rules out automatic elevation.

We have been working hard to come up with substitutes for automatic elevation that would give the kind of assurance that I agree you and the other agencies ought to have, that my people in the field are giving them full and fair consideration. And we have offered an automatic elevation of issues. We have offered additional time at the lowest level to try to work these issues out. We have offered monthly meetings at the field level to address these very specific concerns.

I would submit to you that there certainly has been no intention to dig in anyone's heels. There has been an awful lot of effort expended. I think my colleagues would agree that we have come a long way. Not as far as any of us would like. And we have a ways to go. But certainly I have not intended to dig in my heels, except to the extent of fully and faithfully carrying out what the reform charter told me to do.

Senator **Chafee**. My time is about up. But this so-called reform charter has taken on the status of a magna carta.

I don't know where all of this comes from. I would like to see the language, if somebody could give it to me, that says there can be no automatic elevation. I don't know what automatic elevation means.

Maybe there shouldn't be permission for the Assistant Secretary of Interior for Fish and Wildlife and Parks on a whim to say automatically elevate it. We are not saying to automatically elevate. We are saying elevate because of a reason; namely, the effect on the wetland resources. That is not an automatic elevation, any more than it is automatic elevation because the thing is of national significance.

Where is this? Could you get me a copy of that language?

Mr. **Dawson**. Yes, sir. We have submitted that to the committee before, but I will get you that specific phrase.

[The information requested follows:]

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

20 SEP 1985

Honorable John H. Chafee
Chairman
Subcommittee on Environmental Pollution
Committee on Environment
and Public Works
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Thank you again for the opportunity to provide the Department of the Army's views on the Section 404 program during the September 18, 1985, oversight hearing.

Enclosed is a copy of the charter of the Presidential Task Force on Regulatory Relief on the Sections 404/10 regulatory program. I have highlighted the sections that deal directly with the elevation process as you requested. I am actively working to respond to the other questions raised by you and other members of the Subcommittee and will respond as agreed.

If I can provide additional information to clarify Army's administration of the Section 404 program, please let me know.

Sincerely,

(Signed)

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

Enclosure

OFFICE OF THE VICE PRESIDENT
WASHINGTON

May 7, 1982

Honorable William R. Gianelli
Assistant Secretary of
the Army (Civil Works)
Department of the Army
Washington, D.C. 20510

Dear Bill:

I am transmitting with this letter the program of reforms to the Section 404/10 regulatory program developed for the Presidential Task Force on Regulatory Relief and approved by the Task Force. As the leader of the group that evaluated the problems of the Section 404/10 program and recommended major changes to the Task Force, you are to be congratulated for a solid start on one of the Administration's most important regulatory relief efforts.

As you know better than anyone, however, the most important work still lies ahead, in implementing the ambitious regulatory and administrative changes described in the enclosed document. Since many of these changes involve agencies other than the Corps of Engineers, you should continue your interagency leadership role during the implementation phase. While the Task Force expects other agencies to take the initiative in instituting prompt and appropriate program changes consistent with the policies described here, we will rely on you to coordinate overall implementation and to keep the Task Force informed of progress and any problems that should arise.

I wish to thank you and the other members of your working group for the dedicated effort that has completed the first phase of this project so successfully. I am confident that, under your leadership, the implementation phase will meet with equal success--reducing substantially the burdens and uncertainties that have beset the Section 404/10 program without compromising its important environmental protections. You can be assured of the full support of the Task Force in carrying out this vital regulatory reform.

Sincerely,

Christopher DeMuth
Executive Director
Presidential Task Force on
Regulatory Relief

Enclosure

ADMINISTRATIVE REFORMS TO THE
REGULATORY PROGRAM UNDER SECTION 404
OF THE CLEAN WATER ACT
AND SECTION 10 OF THE RIVERS AND HARBORS ACT

I. Reducing Uncertainty and Delay

A. The United States Army Corps of Engineers operates the Section 404 and Section 10 permit programs under Memoranda of Agreement with several other federal agencies that have responsibility for commenting to the Corps about the environmental, wildlife, and other aspects of proposed dredging or filling operations. These Memoranda provide for four layers of automatic review or "elevations" of individual permit decisions whenever a commenting agency disagrees with the approach adopted by the Corps. The review process has introduced long delays into a substantial number of major permit applications. It has also been used to blur authority and accountability for final permit decisions, which by statute belong with the Army. These aspects of the program run directly counter to the language of Section 404, which directs that the purpose of the Memoranda of Agreement is to "minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits" (404(q)), and which does not authorize "appeals" of Corps decisions among federal agencies.

To cure these problems and return the program to the expeditious procedures required by Congress, the Department of the Army and the commenting agencies will prepare new Memoranda of Agreement no later than two months from today providing that:

1. The final permit decision will be made by the District Engineer in the vast majority of cases.

2. The necessity for reopening the record of a case developed by the District Engineer will be minimized.

3. [redacted] Reviews will be limited to cases of insufficient interagency coordination at the District level, the development of significant new information, or the necessity for policy-level review of issues of national importance within the authority of the agency recommending review.

4. Recommendations for review must be made within 15 working days of the District Engineer's notice of intent to issue a permit. [redacted] the record of the District Engineer's decision will then be forwarded to the reviewing official within 10, 20, or 30 working days, respectively. In the vast majority of cases the entire review process should be completed within 90 calendar days of the District Engineer's notice of intent to issue a permit; in no case should the review process exceed 120 calendar days.

5. Requests for extensions of time in the basic public comment period from commenting agencies must be made in writing by the Regional Director or Regional Administrator and must demonstrate the need for additional data which could not have been collected during the original period. Time extensions for any individual permit may not exceed 30 days.

6. The Memoranda of Agreement with the Departments of Agriculture and Transportation will provide that the Corps will accept to the extent legally appropriate the environmental documentation and decisions made under the regulations of these departments. Provision should be made for DOT and DOA to elevate a permit action to the ASA(CW) in a similar way to that outlined in paragraphs 3 and 4 above when the District Engineer proposes, contrary to the view of DOT or DOA, to deny a permit on a DOT or DOA project.

7. The Memoranda of Agreement will apply only to permit applications under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection Research and Sanctuaries Act (except for compliance with ocean dumping criteria). They will not be used for review of permits for which an exemption has been sought under the Endangered Species Act or for those which have a separate review mechanism.

B. The Army will also revise its own regulations to reduce substantially the time it currently takes to prepare Environmental Impact Statements and other documents required by the National Environmental Policy Act. Furthermore, the Army will take steps to reduce or eliminate delays caused by investigations and other procedures required under the National Historic Preservation Act. Finally, the Army will revise the application process to ensure that only the minimum necessary information is received at the outset, to clarify what is required of applicants, and to limit requests for additional information to that essential for a complete record of the decision.

C. The Army will adopt as soon as practicable administrative measures to reduce the average time for obtaining a decision on a permit application. Strict time limits on the Corps' in-house procedures will be set so that, apart from requirements or procedures mandated by law, a decision on a completed application will ordinarily be forthcoming within 60 days of its receipt. An internal monitoring system will be established to ensure that these time limits are strictly observed. These measures will demonstrate the Army's resolve to demand no less from itself than from other agencies to speed up the Section 404 process. The Army will also consider other measures to reduce the delays to which the program has been prone.

II. Giving the States More Authority and Responsibility

A. The Army will proceed promptly to evaluate existing state programs and to issue general permits for particular categories on a state-wide basis, with appropriate safeguards, in those states whose programs are substantially similar to the Army's regulatory program.

B. The Army will not override decisions made by state and local governments on such matters as zoning or land use, unless water quality, navigation, or other issues of national importance are involved.

C. The EPA will revise its regulations under Section 404(g)-(l) to provide increased incentives and simplified procedures for state assumption of the Section 404 program. Once a state has assumed the program, federal oversight will be kept to the minimum consistent with statutory obligations and considerations of national importance.

III. Reducing Conflicting and Overlapping Policies

A. Recognizing that the Section 404 program will greatly benefit from improved operational controls and reduced jurisdictional conflicts, the Army will:

1. Revise its regulations to reduce the time needed for state action on certification requests to the greatest extent reasonably possible.

2. Review those regulations which affect the Army's Section 404 activities and which impede implementation of the reform measures described herein, and develop proposals to correct the identified deficiencies.

B. The EPA's Section 404(b)(1) guidelines will be shortened, simplified, and made consistent with the reform measures described herein.

IV. Expanding Use of General Permits

The Army will expand the use of general permits on a regional and national basis as quickly as possible, both to minimize delay and paperwork and to eliminate duplication with other federal programs. The Army will vigorously pursue the concept of "state program general permits" for appropriate categories in recognition of states' ongoing efforts to protect environmental quality.

V. Clarifying the Scope of the Permit Program

The Section 404 program has been plagued by uncertainties over its jurisdictional scope. Individuals planning construction, exploration, or development projects in the vicinity of bodies of water have frequently been uncertain whether a Section 404 permit was required, and have sometimes been required to obtain permits or modify projects after they had begun or completed them.

The Administration is strongly committed to protecting the nation's important wetlands. However, a proper regard for Congressional intent and sound administrative practice requires recognition that the purpose of Section 404 is not to restrict development of certain types of land as such, but rather "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." While Congress' definition goes beyond the traditional definition of "navigable waters" covered by earlier Corps regulatory programs, it also does not encompass all biological "wetlands" however defined or regardless of their connection to waters.

The current administrative definitions of the jurisdiction of the Section 404 program, contained in regulations of the EPA and the Corps, need to be clarified to provide better guidance to private parties and the Corps' own District Engineers. EPA and the Army, in consultation with other expert agencies, will develop new and more specific criteria redefining the scope of the program, based upon technical parameters and specifying which types of wetlands are and are not appropriately covered by the Clean Water Act. The purpose of the new criteria will be to introduce a reasonable degree of certainty into the scope of the Section 404 regulatory program and to maintain essential protection of the chemical, physical, and biological integrity of the Nation's waters.

VI. Review of Administrative Reforms

All regulations, guidelines, and Memoranda of Agreement under this reform program will be submitted to the Office of Management and Budget for review under Executive Order 12291 for consistency with the principles set forth in that Order, the policies set forth in the relevant statutes, and the administration's resolve to streamline and simplify the Section 404 regulatory program. The New Memoranda of Agreement will be submitted to OMB for approval within 60 days after the announcement of these regulatory reforms.

* * * * * * * * * *

FACT SHEET

The U.S. Army Corps of Engineers' Section 10/404 Regulatory Program

- The Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977 were enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Section 404 of the Clean Water Act authorizes the Secretary of the Army, acting through the Chief of the U.S. Army Corps of Engineers, to issue permits for the discharge of dredged or fill material into the waters of the United States, applying guidelines developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of the Army.

- The Army Corps of Engineers administers Section 404 as part of its regulatory permit program, which also includes Section 10 of the Rivers and Harbors Act of 1899 and Section 103 of the Marine Protection, Research and Santuaries Act. Section 404 expanded the Corps' regulatory program from traditional navigable waters (for which Section 10 permits were also required) to "waters of the United States," which have been construed by some to encompass practically all waters and wetlands.

- Over 100,000 actions are annually affected by the Corps' regulatory program. As allowed by the Act, the Corps has issued "general permits" which do not ordinarily require individual processing. About 90,000 actions annually are covered under general permits. The total number of permits processed individually in one year under Sections 10, 10/404, and 404 is about 18,000. Of these, 43 percent are for Section 10 permits, 40 percent are for Section 10/404 permits, and 17 percent are for Section 404 permits.

- The Act calls for minimization of duplication, needless paperwork, and delays in issuance of permits, and sets a target of ninety days for a decision on an application. For this purpose, the Secretary of the Army is required to develop agreements with heads of other agencies, such as EPA and the Departments of Interior and Commerce, which have statutory responsibilities for advising the Corps about environmental, wildlife, and other impacts of permit applications.

- The Section 404 program has been plagued by severe delays that have generated complaints and imposed heavy economic burdens on the public. Despite recent improvements, average processing time for "delayed" (processing time greater than 120 days) permit actions was 315 days for applications requiring Environmental Impact Statements (EIS), and 270 days for those not requiring an EIS. Roughly 3 of every 10 permit actions are delayed and 1 percent of those delayed require an EIS. Based upon the number of permit aplications experiencing processing time longer than 120 days, the total cost of delays has been estimated on a very rough basis by the Corps to be in excess of $1.5 billion annually.

o A significant part of the delay experienced in the program has resulted from the time extensions frequently requested by commenting agencies and the complex "elevation" process for dispute resolution permitted by the Memoranda of Agreement. An agency that is dissatisfied with a decision of the Corps District Engineer can have the case elevated for reconsideration through four successive decision levels. Furthermore, the threat of elevation, with its concommitant delay in reaching a decision, has often caused applicants to accede to unnecessary and unreasonable changes in their plans. Since March 24, 1980, there were 281 cases where the District Engineer proposed to issue a permit over the objection of another federal agency. Of these, 211 cases were not elevated. Of the remaining 70 cases, 55 were resolved by the Division Engineer, for an average delay time of 150 days. An additional 5 cases are still pending at this level. Five cases were resolved by the Office of the Chief of Engineer, for an average delay time of 320 days. The remaining five cases were resolved by the Assistant Secretary of the Army (Civil Works), for an average delay time of 650 days. Of those 70 cases, 26 elevations were requested by the National Marine Fisheries Service (NMFS), 50 by the U.S. Fish and Wildlife Service (FWS) and 16 by the EPA (an elevation request is sometimes made by more than one agency). The average delay resulting from elevation for these cases was 202 days. The Corps has also estimated that the threat of elevation affected about 1700 other cases, causing an average delay of 75 days.

o Two illustrative cases of delays in the Section 404 program are provided at the end of this fact sheet. The first illustrates the kinds of complications that can arise from several layers of reviews involving different agencies. The second illustrates that long delays have occured even over relatively minor issues.

- The Act contemplates that the states will eventually administer their own dredge and fill permitting programs. It therefore sets out conditions and procedures whereby EPA will approve transfer of authority to such states. These transfer provisions (Section 404(g) thru (l)) and the EPA's implementing regulations are extremely complex and give the states minimal incentives for assuming permitting authority. As yet no state has assumed such authority, although to varying degrees they do administer their own water resource management programs.

- In administering its regulatory program, the Corps is subject to a large number of statutory, executive, and regulatory constraints requiring extensive documentation. These constraints include EPA's detailed guidelines under Section 404(b)(1), EPA's veto authority under Section 404(c), state authority to regulate discharges in navigable waters within their jurisdiction under Section 404(t), state authority to issue water quality certification under Section 401, and coordination with other federal agencies such as FWS, NMFS, EPA, and the Advisory Council on Historic Preservation (and their state counterparts). The NEPA process and Executive Order 11988 on flood plains also apply to the Army's program.

- The Act does not define "waters of the United States" in operational terms. However, it has been interpreted in the broadest possible terms so that considerable uncertainty and difficulty have arisen concerning the extent of the Corps' jurisdiction. This has led over the past decade to several attempts at more precise jurisdictional delineation, both statutory and regulatory, as well as to considerable litigation. Currently, the term is defined by regulation to cover all traditional navigable and interstate waters, their tributaries, and their adjacent wetlands, including such areas as prairie potholes, isolated lakes, and intermittent streams. The Corps has estimated that the area of wetlands that could be associated with its program amounts to hundreds of millions of acres. The process of clarifying precisely what types of bodies of "water" are included in the Section 404 program is still continuing, even though the primary purpose of the Act--protecting the chemical, physical and biological integrity of the Nation's waters--is not in dispute.

- In August 1981, the Presidential Task Force on Regulatory Relief designated the Section 404 regulatory program for review. The administrative and regulatory reforms announced today are based upon the recommendations of an interagency working group, chaired by the Department of the Army and consisting of the Department of Interior, the Department of Commerce, the Environmental Protection Agency, and the Office of Management and Budget. In developing its recommendations, the working group received helpful suggestions and information from government agencies and several state officials and private citizens and organizations. Both the administrative and the regulatory reforms are scheduled to be implemented over the next 2-6 months. The Corps expects that these reforms, when fully in place, will reduce significantly the number of permit applications likely to experience significant delays. They can be translated, roughly, into a cost savings in excess of $1 billion annually, based on the estimated cost of current permit delays of more than $1.5 billion.

CASE SUMMARY NO. 1

LAKE ALMA PERMIT

The Lake Alma project was originally part of a Department of Housing and Urban Development grant to construct a public reservoir to help satisfy water-oriented recreation needs of the City of Alma and Bacon County, Georgia, and to stimulate economic growth in the region.

On October 4, 1977, the City of Alma and Bacon County Commissioners applied for an Army Section 404 permit. The application called for the construction of an earthen dam to create a 1,400 acre recreation lake on Hurricane Creek.

EPA and the US Fish and Wildlife Service objected to issuing the permit on the ground that the project did not justify elimination of approximately 1,400 acres of wetlands and that quality of the lake water would be unacceptable for recreational uses. The Georgia Department of Natural Resources supported the project citing the relative low quality of the existing wetlands; the Environmental Protection Division of DNR stated that water quality in the proposed lake would meet or exceed all applicable water quality standards for recreational waters.

The FWS conducted an evaluation of the project and submitted a mitigation plan which included a provision that the applicants purchase and manage additional acreage to offset the loss of wildlife habitat. Following acceptance of the mitigation plan by the applicants, FWS withdrew its objection.

The mitigation plan included a group of six small artificial lakes (green tree reservoirs, comprising a total of 194 acres) to be constructed and managed for wildlife habitat. EPA then added to its objection the concern that the green tree reservoirs would be detrimental to water quality. EPA continued its objection to the project as it was elevated through the Division Engineer and the Chief of Engineers to the Assistant Secretary of the Army for Civil Works, with each level trying to resolve EPA's concerns. When the ASA(CW) received the report in August 1981, he consulted with EPA and called for a restudy of the green tree reserviors. Upon completion of the study, the ASA(CW) directed the issuance of the permit. In September 1981 he transmitted his decision to the EPA Administrator who could have, but did not, elevate the matter to the Secretary of the Army.

The permit was finally issued on November 10, 1981, four years after the application.

CASE SUMMARY NO. 2

CAMERON CONSTRUCTION COMPANY

On June 19, 1979 the Cameron Construction Company applied for a Corps permit to convert 10 acres of marsh along a navigation channel to a water oriented commercial use. The proposed project would allow Cameron Construction to expand its operations in Cameron, Louisiana, to meet the increased needs of energy producers. The proposed site is near Cameron Construction's existing facility and would require the placement of fill material over the 10 acres and construction of a 614-foot long bulkhead.

The National Marine Fisheries Service, part of the Department of Commerce, objected to the permit on the grounds that the project would have significant adverse consequences on important marine resources and that there were other viable alternatives. The Corps of Engineers disagreed with NMFS and proposed to issue the permit. Subsequently, in accordance with the 404(q) Memorandum of Agreement, NMFS elevated the issue to the Division Engineer and then to the Chief of Engineers. At each level, the Corps weighed all factors, including the concerns of NMFS, and found that the public interest was best served by issuing the permit.

On February 2, 1981, the matter was elevated to the Assistant Secretary of the Army for Civil Works. After evaluating all aspects of the issue, the ASA(CW) found that, although the 10 acres of wetlands would be lost, this only represented five ten-thousandths of one percent of the total wetlands in the area and that the benefits to be gained from the project were considerable. Further, he found that the Corps had adequately evaluated eight alternatives to the proposed action and had found that none of them offered significant advantages over the proposal.

In April 1981, the ASA(CW) decided that it was in the public interest to issue the permit and directed the Corps of Engineers to do so. The permit was issued on June 20, 1981, two years after the application.

Mr. Dawson. What you have just said, Mr. Chairman, I don't believe is an unreasonable request of us and of the whole process.

Senator Chafee. You mean my request of elevation because of national significance?

Mr. Dawson. Yes, sir.

Senator Chafee. I made that request the first time we met, Mr. Dawson.

Mr. Dawson. Yes, sir. And I believe we have been trying, in obviously our imperfect way, to respond.

Senator Chafee. I would not say it is imperfect, but it is not a very hasty way. I am sorry to interrupt. Go ahead.

Mr. Dawson. That was my point, that I think that is a reasonable position. I would submit to you that the 30 or so we have considered so far, environmental grounds have been the heart and soul of those elevation requests. What we have to do is fashion the process where that is more readily evident and more assurance is given to my colleagues in the other agencies.

Senator Chafee. My time is up. Senator Mitchell?

Senator Mitchell. Mr. Horn, you were present during my earlier questioning of Mr. Sanderson and Mr. Dawson. You heard Mr. Dawson say that he was speaking for the administration regarding the standard to be applied in these cases. As a member in good standing of the administration, I assume you are now prepared on behalf of the Department of the Interior to say that you subscribe to the administration view as stated by Mr. Dawson and by Mr. Sanderson?

Mr. Horn. That is correct. It is clear with respect to the section 404 program, that the key decisionmaking authority is conferred on EPA and the corps. We would ask them to defer to us on the Endangered Species Act. So we are going to be deferring to them on this particular interpretation of section 404.

Senator Mitchell. All right. But just so you are fully aware of this, I received a letter dated August 2 from Keith E. Easton, Associate Solicitor, in which he declined to advance a view on this, thereby contradicting Mr. Potter, who had previously in one of these hearings expressed a personal view consistent with that expressed here by Mr. Sanderson and Mr. Dawson. Just so you are aware of that. You ought to be aware of that. Evidently there have been discussions and this is now clearly an administration position.

Mr. Horn. Yes, sir.

Senator Mitchell. I want to make sure that is the case.

Mr. Horn. Yes, it is.

Senator Mitchell. Thank you.

I would like to ask both Mr. Dawson and Mr. Sanderson, as you recall, the other area I inquired about at the last hearing was the definition of landfill. You, Mr. Dawson, at that point outlined a time schedule for resolution which had three target dates.

By September 1 you said you would wrap up the search for information. By October 1 you would try to arrive, and you later said you thought you would arrive, at a joint statement of the agencies working independently. Then using that, you would endeavor to resolve the matter by the end of the year.

I would ask you either to describe to me orally now or, if you prefer, just give us a letter later telling us are you on schedule? Are you making progress in that regard?

Mr. DAWSON. We are indeed on schedule, Senator Mitchell, and we will give you a letter with more detail. We submitted to the committee, as you are aware, after September 1, the fruits of our field review. That information is available.

I certainly would say again we would welcome any input, as we move toward that. That is a very tough problem, but I think we are on the road now to a resolution by a date certain.

Senator MITCHELL. That is very fine.

You agree with that, Mr. Sanderson?

Mr. SANDERSON. We exchanged information with the corps on September 3.

Senator MITCHELL. Perhaps I could state the request in the negative. I know sometimes you probably think it is hard to do your job, you are answering so many requests from members of the committee and the Congress. Perhaps I could state it in a negative.

If at any point it develops that it does not appear that you will be able to meet the schedule, you will then inform me and the committee in writing and the reasons therefor. In the absence of any such communication, we will assume you will have this matter resolved in some manner by the end of the year. We would like, of course, to be kept abreast. That might relieve you of a little bit of reporting burden.

Mr. SANDERSON. Thank you, sir.

Mr. DAWSON. Thank you, sir.

Senator MITCHELL. Thank you.

Mr. Chairman, I yield the balance of my time to you.

Senator CHAFEE. Thank you.

Mr. Dawson, when you testified before us May 21, you made the following statement.

> One significant point to recall is that Congress did not design section 404 to be a wetland protection mechanism and it does not function well in that capacity.

Do you stick by that statement?

Mr. DAWSON. Yes, I do, Mr. Chairman. But I would like to take a moment, if I might, to put that back into context because that statement, not by you but by others, has been taken out of context in recent days.

As I have stated before this committee in the past, the Office of Technology Assessment and our own studies show that somewhere around 10 percent, maybe as high as 15 percent, of the wetlands that are lost each year come under the 404 program. In other words, 80 to 90 percent of the losses are not attributable in any way to 404.

That was the basis for my assertion that 404 is not an effective wetlands protection measure. I believe, too, that when Congress crafted the law, that they had in mind water quality issues of a different nature.

We have all learned a lot in the last 10 years or so about water quality and the extent of the reach of that term. But I believe that if Congress had wetland protection in mind, it would have done much more to cover wetlands than was done with 404.

Senator **Chafee**. Senator Mitchell has one matter he would like to discuss with you.

Senator **Mitchell**. Mr. Chairman, it is a request by Senator Lautenberg, who is very much interested in this matter, but unfortunately had another commitment at this time. He has submitted a couple of questions for the record, Mr. Dawson, which I will simply submit and ask in his behalf that you respond in writing as promptly as possible to his questions.

Mr. **Dawson**. Yes, sir, thank you.

Senator **Mitchell**. Thank you.

[Senator Lautenberg's questions and the responses thereto follow:]

Questions From Senator Lautenberg

Mr. Dawson, on September 11, the U.S. Court of Appeals for the Second Circuit upheld the decision of U.S. District Court Judge Thomas Griesa which vacated the permit for the Westway highway project in New York City. The permit was remanded to the Corps of Engineers for further action. What is the current status of the reconsideration of the permit? If a revised explanation of the environmental effects of the project is to be submitted to the court, when would such a submission be made?

Does the Corps plan to submit any revised permit to the courts prior to September 30?

Response: 1. The Corps of Engineers does not believe it can prepare a legally sufficient review, pursuant to the Appellant Court's order, before September 30, 1985.

2. The Corps is reviewing the situation and is awaiting official State action concerning its option to exercise trade-in. If at that time, or after September 30, should the State not seek trade-in, the Corps of Engineers will determine what further actions, if any, are appropriate concerning the permit application.

Senator **Chafee**. It may be it wasn't the best mechanism, but it is the only mechanism we have, which is the law of the land.

I refer to you the brief of the U.S. Government in the October term of 1984 in the case of *United States of America, petitioner* v. *Riverside Bayview Homes, Inc., et al.,* the brief for the United States.

In that brief they saw fit to quote Senator Muskie. Here he is talking about the destruction of the wetlands.

> There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.
>
> The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of section 404 has attempted to achieve.

There the U.S. Government saw fit to quote that language in its brief. It isn't all to do with water quality. Water quality is a factor. It came up through the Clean Water Act, as you know. That is what 404 is a part of. But it was for more than just clean water, as was pointed out in that quote from Senator Muskie.

I will submit this for the record.

[The information referred to follows:]

No. 84-701

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

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II. THE CORPS' ASSERTION OF SECTION 404 JURISDICTION TO REGULATE DISCHARGES OF DREGED OR FILL MATERIAL INTO WETLANDS ADJACENT TO STREAMS, LAKES, OR SEAS COMPORTS WITH CONGRESSIONAL INTENT

A. The Act's Objectives And Legislative History Demonstrate That Congress Intended To Regulate Discharges Of Dredged Or Fill Material Into "Wetlands" Beyond The Limits Of Traditional Navigable Waters

1. In 1972, Congress substantially rewrote the federal law governing water pollution in order to "restore and maintain the chemical, physical, and biological integrity

of the Nation's waters." 33 U.S.C. 1251(a). The "integrity" of the Nation's waters is a broad concept—"a condition in which the natural structure and function of ecosystems is maintained." H.R. Rep. 92-911, 92d Cong., 2d Sess. 76 (1972). Congress's objective was to achieve that level of water quality that provides for the "protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water" (33 U.S.C. 1251(a)(2)). The strategy adopted to achieve these goals was to control the discharge of pollutants at their source. See generally *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204-205 (1976). Congress recognized that restricting Clean Water Act jurisdiction to those relatively few waterways that support navigation would make it impossible to achieve the objectives of the Act. The Senate Report explained (S. Rep. 92-414, 92d Cong., 1st Sess. 77 (1971)):

> Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.

Accordingly, the statute prohibits the unauthorized discharge of any pollutant—including dredged or fill material—into "navigable waters," defined as the "waters of the United States, including the territorial seas." 33 U.S.C. 1311(a), 1344, 1362(6), 1362(7). Congress's use of the term "waters of the United States" was a deliberate rejection of the more limited concept of traditional navigable waters, in recognition of the fact that that narrow focus was ill-suited to the Act's water quality goals. The House Report stated (H.R. Rep. 92-911, *supra*, at 131):

> One term the Committee was reluctant to define was "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent.

To alleviate its fears, Congress deleted the word "navigable" from the Act's definition of "navigable waters."

The Conference Committee explained that (118 Cong. Rec. 33699 (1972) (emphasis added)):

> The Conferees fully intend that the term "navigable waters" be given the *broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.*

Congress thus clearly understood that traditional concepts of navigability had nothing to do with combatting water pollution and that the Act's purposes require a scientific and functional interpretation of "waters of the United States" directly tied to water quality concerns.[12] Moreover, Congress intended to assert federal jurisdiction over the sources of pollutant discharges into the hydrologic cycle to the maximum extent permissible under the Commerce Clause in order to improve and maintain water quality. In other words, the only constraint on regulatory jurisdiction intended by Congress was the limit of the Commerce Clause power to control water pollution.[13]

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[12] The criteria that the Corps must consider when evaluating permit applications for dredged or fill materials exemplify Congress's water quality concerns. Section 404(b)(1) of the Act, 33 U.S.C. 1344(b)(1), directs the Corps to evaluate permit applications by applying guidelines developed by EPA in conjunction with the Corps. EPA's guidelines (published at 40 C.F.R. Pt. 230) must take into account, inter alia, the effect of discharges of dredged or fill material on fish, shellfish, and wildlife; effects on recreational, economic, and aesthetic values; and changes in aquatic ecosystem diversity, productivity, and stability. Sections 403(c)(1) and 404(b)(1), 33 U.S.C. 1343(c)(1) and 1344(b)(1). In addition, EPA may veto or restrict the use of any site for the disposal of dredged or fill material when it determines that a discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." Section 404(c), 33 U.S.C. 1344(c). Thus, Congress sought through the permit requirement and evaluation process to prevent unnecessary discharges causing significant adverse impacts on water quality.

[13] Historically, federal regulatory involvement in water-related activities focused primarily on the navigability of waterways, but

2. Whatever doubt may have existed concerning the intended reach of the CWA over wetlands was completely laid to rest by the 1977 amendments to the statute. The 1975 interim final regulations promulgated by the Corps in response to *NRDC* v. *Callaway*, *supra*, aroused considerable congressional interest. Hearings on the subject of Section 404 jurisdiction were held in both the House and the Senate.[14] An amendment to limit the geographic reach of Section 404 to traditional navigable waters and their adjacent wetlands was passed by the House, 123 Cong. Rec. 10434 (1977), defeated on the floor of the Senate, 123 Cong. Rec. 26728 (1977), and eliminated by the Conference Committee, H.R. Conf. Rep. 95-830, 95th Cong., 1st Sess. 97-105 (1977). Congress rejected the proposal to limit the geographic reach of Section 404 because it wanted a permit system with "no gaps" in its

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it has long been recognized that other water-related interests can be addressed pursuant to the Commerce Clause, including, inter alia, ecological concerns. See, *e.g.*, *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960); *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940); *Zabel* v. *Tabb*, 430 F.2d 199, 203-204 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971). Regulation of wetlands for the purpose of addressing environmental problems is undoubtedly within Congress's power under the Commerce Clause. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979). Cf. *Utah* v. *Marsh*, 740 F.2d 799, 804 (10th Cir. 1984) (CWA regulation of an intrastate lake that affects interstate commerce is constitutional); *United States* v. *Ashland Oil & Transportation Co.*, 504 F.2d 1317, 1328-1329 (6th Cir. 1974) (CWA jurisdiction over non-navigable tributaries of navigable streams is constitutional).

[14] *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. (1976); *Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. (1975).

protective sweep. 123 Cong. Rec. 26707 (1977) (remarks of Sen. Randolph).

Rather than alter the *geographic* reach of Section 404, Congress amended the statute by exempting certain *activities*—most notably certain agricultural and silvicultural activities—from Section 404's permit requirements. See 33 U.S.C. 1344(f).[15] The Senate Report, which explained the approach ultimately adopted by the Conference Committee, demonstrates that the decision to leave the geographic scope of Section 404 intact was an affirmative approval of the administrative interpretation of the term "waters of the United States." The report stated (S. Rep. 95-370, 95th Cong., 1st Sess. 75 (1977)):

> Initial consideration of the section 404 controversy stimulated discussion on the extent of the waters in which discharges of dredged or fill material will be regulated.
>
> The 1972 Federal Water Pollution Control Act exercised comprehensive jurisdiction over the Nation's waters to control pollution to the fullest constitutional extent.
>
> * * * * *
>
> To limit the jurisdiction of the Federal Water Pollution Control Act with reference to discharges of the pollutants of dredged or fill material would cripple efforts to achieve the act's objectives.
>
> The committee amendment does not redefine navigable waters. Instead, the committee amendment intends to assure continued protection of all the Nation's waters, but allows States to assume the pri-

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[15] Congress also added several other provisions to Section 404, including provisions designed to streamline the permit process and to allow states to administer portions of the program. Altogether, 16 new subsections were added to Section 404. Those amendments demonstrate that Congress thoroughly reexamined Section 404 when it passed the 1977 amendments. In these circumstances, Congress's decision not to alter the geographic reach of the section takes on added significance. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-382 (1982).

> mary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the corps program in the so-called phase I waters. Under the committee amendment, the corps will continue to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until the approval of a State program for phase 2 and 3 waters.[16]

Other evidence abounds to support the conclusion that when Congress rejected the attempt to limit the geographic reach of Section 404, it was well aware that the Corps' 1977 regulations asserted jurisdiction over all adjacent wetlands and some isolated wetlands. For example, Senator Baker stated (123 Cong. Rec. 26718 (1977)):

> Interim final regulations were promulgated by the corps [on] July 25, 1975. * * *
>
> Together the regulations and [EPA] guidelines established a management program that focused the decisionmaking process on significant threats to aquatic areas while avoiding unnecessary regulation of minor activities. On July 19, 1977, the corps revised its regulations to further streamline the program and correct several misunderstandings. * * *
>
> Continuation of the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource.

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[16] This passage is particularly significant because it demonstrates beyond peradventure Congress's understanding of the Corps' phased-in expansion of Section 404 jurisdiction (see page 5 & note 4, *supra*). Instead of rejecting that approach, Congress specifically incorporated the Corps' regulatory scheme into the amendment authorizing partial delegation of the Section 404 permit program to the States. Section 404(g), 33 U.S.C. 1344(g).

> Earlier jurisdictional approaches under the [Rivers and Harbors Act] established artificial and often arbitrary boundaries * * *.

See also 123 Cong. Rec. 38967-38968 (1977) (remarks of Rep. Roberts). Moreover, Congress specifically referred to "wetlands adjacent" to traditional navigable waters as regulated waters in one of the amended Section 404 provisions, 33 U.S.C. 1344(g)(1). Congress's use of this regulatory term of art was an affirmative endorsement of the Corps' interpretation of the scope of its jurisdiction under Section 404.

This legislative history leaves no room for doubt that Congress intended adjacent wetlands to be treated as "waters of the United States." The proceedings leading to the 1977 amendments to the CWA offer a textbook case of congressional approval of administrative action. See *Bob Jones University* v. *United States*, 461 U.S. 574, 599-602 (1983); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969).

Furthermore, the legislative history of the 1977 amendments clearly demonstrates Congress's continuing concern with water quality, its understanding of the significant relationship between wetlands and water quality, and its intention to regulate wetlands under the Section 404 program to promote enhanced water quality.[17] In debating the proposal to restrict Section 404 jurisdiction, it was noted that more than half of the Nation's original wetlands already have been lost by filling, dredging, or draining and that the remaining areas are disappearing at a rate of 300,000 acres per year. 123 Cong. Rec. 26701, 26717 (1977) (remarks of Sens. Stafford and Chaffee). Congress thought it essential to put a stop to this trend in order to achieve the water quality goals of the CWA. For example, Senator Baker, a sponsor of the 1977 amendments, stated (123 Cong. Rec. 26718-26719 (1977)):

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[17] It also bears noting that Congress was fully aware that the dredged material and fill material with which Section 404 is concerned is not harmless "clean dirt." As Senator Baker noted (123 Cong. Rec. 26718 (1977)), dredged and fill materials often "contain a wide range of pollutants, including toxic substances." See also S. Rep. 92-414, *supra*, 74-75; 123 Cong. Rec. 26701, 26713-26714, 26720-26721 (1977) (remarks of Sens. Stafford, Hart, and Muskie); 123 Cong. Rec. 6792-6794 (1977) (statement of Khristine L. Hall, Natural Resources Defense Council, Inc.). And even in the case of fill material that is not contaminated by toxic pollutants, its mere placement into wetlands "can physically destroy essential parts of the aquatic system, including swamps, marshes, submerged grass flats and shellfish beds." 123 Cong. Rec. 26718 (1977) (remarks of Sen. Baker).

> [P]rotection of water quality must encompass the protection of the interior wetlands and smaller streams.
>
> * * * * *
>
> We should be mindful of the fact that when these [wetland] areas are polluted out of existence, we will have lost the very valuable free service of nature; and if toxic-laden dredged or fill material is discharged into wetlands, we risk poisoning the very foundation of our aquatic system.

Senator Muskie, also one of the primary sponsors of the Act, expressed similar views (123 Cong. Rec. 26697 (1977)):

> There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.
>
> The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of Section 404 has attempted to achieve.

See also 123 Cong. Rec. 38994-38996 (1977) (remarks of Reps. Ambro, Lehman, and Dingell); 123 Cong. Rec. 26701-26702, 26713, 26716-26717 (1977) (remarks of Sens. Stafford, Hart, and Chaffee); H.R. Rep. 95-139, 95th Cong., 1st Sess. (1977) (additional views of Reps. Edgar and Myers).[18]

In sum, the court of appeals' conclusion that it is "not clear" (Pet. App. 13a) that Congress wanted the Corps to exercise the broadest possible jurisdiction over the Nation's wetlands is simply untenable when examined in light of the legislative history.

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[18] Finally, Congress also was concerned about the economic impact of the loss of wetland areas on commercial fish harvests and water treatment and flood control costs. See, *e.g.*, 123 Cong. Rec. 26716 (1977) (remarks of Sen. Chaffee); *id.* at 26718 (remarks of Sen. Baker); *id.* at 38994 (remarks of Rep. Lehman). In addition to the estimate that wetlands provide $140 billion worth of water purification and flood control services (see page 3, *supra*), specific illustrations of the economic impact of wetlands destruction were cited. In the early 1960s, for example, a channelization project on the Kissimmee River in Florida eliminated 45,000 acres of flood plain marshes. The unexpected result of the project was a "gross deterioration of water quality in the Kissimmee River and in Lake Okeechobee," into which the river flowed. To undo this damage, "it is going to cost a lot more money." 123 Cong. Rec. 26717 (1977) (remarks of Sen. Chaffee).

Senator **Chafee**. There is a vote on, and I will conclude by asking the following. We have to make our answers brief.

Do I understand, Mr. Dawson, that you are agreeable to working out, in the memorandum of understanding, some language along the lines that we have discussed, that there be an elevation based on effect on natural resources? Not an automatic elevation just because the Administrator or the Secretary wants it elevated, but based on a request because of the effect on natural resources.

Mr. **Dawson**. Mr. Chairman, that effort is already under way, not in any small measure because of this hearing today and the knowledge that we all had that we were going to be appearing here. I believe that that is certainly the objective that we all three have today.

Senator **Chafee**. What is the problem? Just 3 minutes. Why is there a hangup on this? Why can't there be an elevation based on that? It seems to me that is what it is all about. That is what the U.S. Government quoted in its brief.

Mr. **Dawson**. The practical problem, Mr. Chairman, that we are wrestling with, that I believe we can resolve, is every single one of the 12,000 permit applications that are processed have some very legitimate environmental concerns.

Senator **Chafee**. No question about it.

Mr. **Dawson**. So what we want to do is have a mechanism that will allow the review but constrain it, as you have indicated agreeing we need to do.

Senator **Chafee**. But are you thinking these gentlemen are just going to spray you with a shotgun load of these things?

Mr. **Dawson**. No, sir. But before 1981, before the reform charter, the problem that was identified, not by me but by the Presidential task force, was the threat to elevate. If that threat is not circumscribed in advance, then the whole system gets delayed and there is too much concern spent.

Again, I think we can handle that with a little more effort and reach a resolution.

Senator **Chafee**. What has changed from when you were here last time?

Mr. **Dawson**. Well, sir, I think it is a couple of things. One, you and I have had a chance to talk, at least on one occasion since then. You made some additional points.

Another factor is I think we have taken a little more time. We have looked at what has really been going on out there, what the extent of our differences really are on practical individual permits. And we have begun to see that there is no real reason why we can't be true to our reform objectives and still provide the kind of assurance that you are concerned about.

Senator **Chafee**. What do you say about that, Mr. Sanderson?

Mr. **Sanderson**. Yes. That is the situation.

Senator **Chafee**. I know you have been saying yes. But you have been trying before and you have not gotten very far.

Mr. **Sanderson**. I honestly think Mr. Dawson wants to make this work. I want to make it work. With your help and the others, I think we will find a way to do it. I think there is an answer to it and I think we can find a solution that will meet my agency's requirements and his agency's requirements.

Senator **Chafee**. I don't want to be a cynic, but I don't know where you have all gotten religion from all of a sudden.

This is the fourth hearing and we are not much further along, except with statements. Everybody is of good will. No one is accusing anybody of being evil around here. But nothing happens.

What do you say to that, Mr. Horn? Are we getting anywhere?

Mr. **Horn**. Being a new boy on the block, I think yes, our three meetings have been very productive. With respect to the resource criterion, we have identified three or four approaches that might be applied. I am hopeful we can come to some mutual accommodation very, very soon.

Senator **Chafee**. Let me say also, I don't want to give the suggestion that the elevation solves every problem around here. I think that, as you know, Mr. Dawson, you and I have looked at these matters with quite a different eye. I think that your tilt may be propelled by the task force. Were you executive director of the task force?

Mr. **Dawson**. No, sir.

Senator **Chafee**. Weren't you active on that?

Mr. **Dawson**. We certainly were participants in it.

Senator **Chafee**. Mr. Gianelli was the head of it?

Mr. **Dawson**. Yes, sir. Mr. Gianelli was head of the interagency task force on this one particular forum. Vice President Bush was head of it all.

Senator **Chafee**. I know that. This is what we are worried about. We are not worried about the other part.

I think your sympathy and concern, you may find this a harsh statement, but your sympathy and concern for the wetlands is not as great as I would like to see it. Obviously, you probably differ from that. You think you are doing a good job.

Here is a letter from the International Association of Fish and Wildlife Agencies directed to me, signed by Mr. Jack H. Berryman, executive vice president, dealing with this matter, which I will submit for the record.

[The letter follows:]

International Association of Fish and Wildlife Agencies,
September 17, 1985.

Hon. John H. Chafee,
Chairman, Senate Subcommittee on Environmental Pollution, Dirksen Office Building, Washington DC.

Dear Mr. Chairman: The International Association of Fish and Wildlife Agencies, representing the 50 state fish and wildlife management agencies, has grave concerns on how Section 404 of the Clean Water Act is being implemented by the U.S. Army Corps of Engineers. The Corps has adopted internal policies that seriously threaten fish and wildlife conservation nationwide. We solicit your support in getting the Corps to change these policies.

Specifically, the most damaging policy was cited in a May 17, 1985, letter from Chief of Engineers Lt. Gen. Heiberg to Brig. Gen. Dacey in which Gen. Heiberg supported Acting Assistant Secretary of the Army Dawson's policy to the effect that: "In the public interest review, once a District Engineer determines that it is in the public interest to issue a (404) permit, all of the factors having been considered, no other conditions (e.g. mitigation) can be required."

In practice, this has meant that whenever any Corps District Engineer has determined, for whatever reasons, that a project requiring a 404 permit is in the public interest, mitigation of adverse impacts on fish and wildlife is not required. In some other instances, mitigation specified as a condition for a 404 permit has been left to the discretion of the applicant as to whether or not it would be done. These procedures are unacceptable to state fish and wildlife agencies. They violate the principle of both the Fish and Wildlife Coordination Act and the National Environmental Policy Act, not to mention that they seriously undermine state wildlife management efforts.

We urge action by your subcommittee insuring abandonment by the Corps of its anti-mitigation policies and replacement with provisions that consider wildlife as beneficial public resources that will receive equitable treatment in all its dealings, including 404. The Corps policy should be directed at full and creative mitigation of impacts adverse to fish and wildlife resources, and mitigation specified as a 404 permit condition should be uniformly enforced rather than leaving compliance to the discretion of the applicant.

We are also gravely concerned that the protection provided to natural resources under Section 404 (b.1) Guidelines and Section 404 (c) will be negated by the Corps' recent interpretation of the public interest process. It appears that EPA's responsibility to protect water supplies, wildlife, shellfish, fisheries, and recreational resources can be effectively ignored or over-ridden by the Corps without a proper forum for challenging a public interest determination. This appears to be a clear violation of EPA's legal responsibility to prohibit or restrict the improper use of any discharge site under Section 404 (q) of the Clean Water Act.

Senator Chafee, we request that our concerns and interests be addressed in your subcommittee oversight hearing on the Corps of Engineers 404 policies and procedures scheduled for September 18. We stand by to assist you in any way we can. Thank you.

Sincerely,

JACK H. BERRYMAN,
Executive Vice President.

Senator CHAFEE. Senator Stafford asked that I submit for the record a letter addressed to him from the mayor of New Haven, CT, regarding an issue over section 404. I will submit this letter to you, Mr. Dawson, and would like you to respond to the mayor's letter, for the record. It is only a page and a half, so he can't have too many questions in it. But he does enclose a long letter that apparently he wrote to Secretary Marsh.

Thank you all very much, gentlemen. That winds up this hearing.

[Whereupon, at 3:55 p.m., the subcommittee was recessed, to reconvene subject to the call of the Chair.]

[The letter from the mayor of New Haven together with attachments and responses, replies from Mr. Dawson to additional questions from Senator Chafee, and statements submitted for the record follow:]

OFFICE OF THE MAYOR

CITY OF NEW HAVEN
CONNECTICUT 06510

BIAGIO DILIETO
MAYOR

July 23, 1985

Honorable Robert Stafford (Vermont)
United States Senate
Washington, D. C. 20515

Dear Senator Stafford:

On behalf of the residents of New Haven, Connecticut, I am asking for your help and support. New Haven has been subjected to the deceptive and improper conduct of officials within the United States Army Corps of Engineers that has caused substantial harm to our public/private/University revitalization efforts and has contravened the most fundamental notions of fairness and due process.

New Haven's social and economic revitalization effort has been threatened with irreparable harm by the proposed construction of the largest regional shopping mall in Connecticut. It is to be constructed in North Haven, Connecticut, approximately eight miles from our City's core, on the floodplain and wetlands (25 acres would be destroyed) of the Quinnipiac River (which flows into New Haven Harbor) and, as a consequence, requires a fill permit under Section 404 of the Clean Water Act from the Corps of Engineers.

The facts surrounding the improper Corps' conduct are set forth in the attached letter to Secretary of the Army John Marsh. After five years of formal environmental and socioeconomic review, the Corps official responsible for making the final decision signed the decision document denying the application on November 15, 1984. The applicant was informed orally of the denial on the same day, and a news conference was scheduled for November 16, 1984 to announce the denial.

On November 16, 1984, in a closed meeting (no notes or transcript) between the Corps' decision-maker and the applicant, the decision-document (including the final conclusions and reasoning) was delivered to the applicant. No other member of the public, including New Haven, was informed that the decision to deny was made and signed. Moreover, despite a formal Freedom of Information Act request in December 1984, the reasoning and conclusions of the signed decision were intentionally suppressed by Corps' officials for the past seven months. Since that time, the applicant has conducted a secret appeal process within the Department of the Army in Washington, D.C., quietly attempting to reverse a decision of which it alone was aware. On July 15, 1985 the City of New Haven received--for the first time--a copy of the signed decision.

Please review the letter to Secretary Marsh. I hope that, despite your own busy schedule, you will take the time to inquire into this matter. It is of vital importance to us; and, it is precisely the kind of conduct that harms the credibility and legitimacy of government.

We are prepared to offer you every assistance and access to all the information we possess. My Development Administrator, Will Ginsberg (203-787-8333), myself (787-8200), or New Haven's Special Counsel, Neil Proto (Kelley, Drye and Warren of Stamford, Connecticut (203) 324-1400 and Washington, D.C. (202) 463-8333; or City Hall, New Haven, (203) 787-6463) are available to you or to your staff to answer any questions you may have.

I look forward to hearing from you.

Sincerely,

Biagio

Biagio DiLieto
Mayor

OFFICE OF THE MAYOR

CITY OF NEW HAVEN
CONNECTICUT 06510

Biagio DiLieto
Mayor

July 3, 1985

Honorable John Marsh
Secretary of the Army
Pentagon
Washington, D.C. 20310

Dear Secretary Marsh:

Re: Improper Conduct Concerning the
Application of Mall Properties,
Inc. for a Fill Permit

On behalf of the people of the City of New Haven, I formally request your immediate investigation into the improper and, in our view, illegal conduct of Corps of Engineers officials in Waltham, Massachusetts.

For the last seven months, Colonel Carl Sciple, Division Engineer of the New England Division, has intentionally suppressed the Final, Written, Signed Decision to deny the application of Mall Properties, Inc. for a fill permit, under Section 404 of the Clean Water Act, 33 U.S.C. 1344, to construct the proposed North Haven Mall. That Final Decision was signed by Colonel Sciple on or about November 16, 1984 and hand delivered to Mall Properties, Inc. in a closed meeting the same day. It was not presented to any member of the public, including the City of New Haven. The truth of what actually occurred was revealed, over the Corps' objection, in court-ordered depositions of three Corps officials on June 27, 1985.

As a consequence of the Corps' actions, the City of New Haven and other members of the public were deceived and harmed.

In our view, the Signed Decision of November 16, 1984 was a final decision as a matter of law, and should have ended this controversy. Instead, Mall Properties, Inc. -- which was aware of the Corps' decision to suppress the Signed Decision -- has been unfairly allowed by the Corps to conduct a private, secret appeal process out of public purview for the past seven months designed to reverse the decision of which it alone was aware.

Under these circumstances, and for the reasons set forth in detail below, I strongly urge that the conduct exhibited by Corps officials -- and the applicant, Mall Properties, Inc. -- be fully investigated, and any information or pleading submitted to the Corps of Engineers by Mall Properties, Inc. since November, 1984, be expunged from the Administrative Record.

I

The Deception and the Truth

On November 16, 1984, the New England Division of the Corps of Engineers held a Press Conference in East Hartford, Connecticut allegedly to announce the status of the application of Mall Properties, Inc. for a Section 404 fill permit. The application had been under intense scrutiny by the Corps of Engineers since 1979.

At that press conference, Warren Nordman, the Public Affairs Officer for the Corps, informed the press that Colonel Sciple had three substantive concerns (adverse effects on wetlands, flooding and socio-economic conditions), about the application that he had conveyed to Mall Properties, Inc. earlier that same day. Mr. Nordman also said that Mall Properties, Inc. would be allowed to submit additional information ("mitigation measures") designed to respond to those concerns. No written press release was issued by the Corps at the press conference.

On November 19, 1984, Mall Properties, Inc. issued a formal press release. It stated that it expected "to respond to the U.S. Army Corps of Engineers within 30 days by providing developed plans to mitigate areas of concern raised by the Corps at a Friday (November 16, 1984) news conference." Mall Properties, Inc. Attorney, Daniel Riesel of Sive, Paget and Riesel, explained what the Corps' action meant to Mall Properties, Inc.:

> . . . mitigation of possible impacts is a standard procedure which my client understood might come into play in this process. The procedure does not reflect negatively on the merits of the application and we expect the process to go forward expeditiously. (Emphasis added).

During the seven months (from November 16, 1984 to June 24, 1985) that followed the press conference, Mall Properties, Inc. did not submit "developed plans to mitigate areas of concern raised by the Corps" nor did the Corps make any further public statements about what had occurred on November 16, 1984. In December, 1984 -- following a Freedom of Information Request by a reporter for the New Haven Register -- the Corps did not release to the public the Signed Decision of November 16, 1984 that it had in its possession. Instead, it released a "Draft Record of Decision" that contained no final conclusions about the issues in controversy or a conclusion on the ultimate decision (to grant or deny the permit) or the signature of Colonel Sciple approving the decision. On June 24, 1985 -- after seven months -- Mall Properties, Inc. finally submitted its mitigation measures "designed to address the concerns identified in the Corps of Engineers' November 1984 proposed Record of Decision ("ROD") for the North Haven Mall."

None of this conduct accurately reflected what occurred on November 15 and 16, 1984. The truth was revealed to New Haven only a few days ago.

On June 27, 1985, two attorneys representing the City of New Haven took the depositions of three Corps officials in the Waltham, Massachusetts' office, each testifying separately from the other. Copies of these depositions accompany this letter. The depositions were taken in City of New Haven v. Federal Emergency Management Agency (FEMA), U.S.D. CT, D. Conn. Civil No. N84-437 (WWE). United States District Judge Warren Eginton allowed the depositions, over the Corps' objections, following the statement by FEMA implying that in November, 1984, the Corps had made a decision not to grant the permit.

The three depositions revealed the following facts:

1. On November 15, 1984, each member of Colonel Sciple's staff in a position of responsibility formally recommended to Colonel Sciple that the application be denied. (Deposition of Robert DeSista, 36; Deposition of William Lawless, 10-11).

2. On the same day, Colonel Sciple was presented by his staff with Final, Written Conclusions on the major issues in the controversy and a Final, Written Decision document denying the application. (Deposition of Robert DeSista, 36).

3. On or about November 15, 1984, Colonel Sciple signed the Final, Written Decision document denying the application.

The following colloquy occurred between Neil Proto, Counsel for New Haven and Robert DeSista, the Project Manager in charge of processing Mall Properties, Inc.'s application (Deposition of Robert DeSista, 69-70), concerning Colonel Sciple's action:

> Q. [Mr. Proto] In your experience here in Waltham, when a final decision is made concerning a 404 permit application, does it take a particular form?
>
> A. [Mr. DeSista] A final decision, yes.
>
> Q. Could you describe what that form is?
>
> A. A final decision to issue a permit or deny a permit is called a findings of fact, Statement of Findings, excuse me. And if the permit is to be issued, there is a permit.
>
> Q. And is it usually signed?
>
> A. The Statement of Findings, yes, is signed.
>
> Q. Who would sign it?
>
> A. Most cases Bill Lawless [Chief of the Regulatory Branch], if the permit is to be issued. If they are to be denied, deputy engineer or division engineer. (Emphasis added).
>
> Q. In this application process involving Mall Properties' 404 application, was a final decision document, as you've just described it, ever prepared?
>
> A. Yes.
>
> Q. Was it ever signed?
>
> A. Yes.

Q. What happened to that document?

A. Physically?

Q. Yes.

A. I have a copy in my file.

Q. You do?

A. Yes.

See also Deposition of William Lawless, 12.

4. On or about November 15, 1984, copies of Colonel Sciple's Signed Decision were distributed to members of the staff, including the Project Manager who is responsible for processing Mall Properties, Inc.'s application and preserving all information, pleadings and documents associated with said application. (Deposit on of Robert DeSista, 69-70).

5. On November 15, 1984, Colonel Sciple directed William Lawless of his staff to (a) inform Mall Properties, Inc. that he had decided to deny the permit and (b) invite them to Waltham, Massachusetts to be informed of the reasons for the decision to deny the permit. (Deposition of William Lawless,, 19-20).

6. On November 15, 1984, Warren Nordman, the Director of Public Relations (a) prepared a press release announcing the denial of the permit and (b) began the process of inviting members of the press to a press conference the next day in East Hartford, Connecticut during which the press release was to be distributed. (Deposition of Warren Nordman, 5-10).

7. On November 16, 1984, a private meeting was held in the Corps' offices in Waltham, Massachusetts among Colonel Sciple, Robert DeSista (Project Manager) and William Lawless (Chief, Regulatory Branch) and Morton Olsheim, Richard Steinberg (both of Mall Properties, Inc.), Arnold Fleming (a consultant to Mall Properties, Inc.), Daniel Reisel and Mark Chertok (attorneys for Mall Properties, Inc.). (Deposition of Robert DeSista, 50).

8. During the meeting identified in #7 above, Colonel Sciple informed Mall Properties, Inc. of his decision to deny the permit and the reasons for his decision. (Deposition of Robert DeSista, 52-53). He hand delivered to Mall Properties, Inc. a copy of his Final, Written, Signed Decision denying the application. (Deposition of William Lawless, 15; Deposition of Robert DeSista, 53). During this meeting, Mall Properties, Inc. sought to convince Colonel Sciple to change his signed decision.

The following colloquy occurred between Neil Proto, Counsel to New Haven and Robert DeSista concerning the meeting with Mall Properties, Inc. and Corps officials (Deposition of Robert DeSista, 53-54):

> Q. [Mr. Proto] Did they receive a copy of any conclusions?
>
> A. [Mr. DeSista] Yes.
>
> Q. Were they informed by Colonel Sciple that he had made up his mind to deny the application?
>
> A. Yes.
>
> Q. What was their reaction to what he said concerning the denial of their application?
>
> A. They felt that they should have the opportunity to modify their proposal to provide mitigation, to mitigate the concerns that we had presented. They felt that such a decision should not be made without first having it reviewed in Washington.

We are uncertain, at this time, of what else occurred at that meeting. A copy of Colonel Sciple's decision was retained in the Waltham office by Mr. DeSista. To this date, however, the Corps has never made public the Signed Decision.

9. Mr. Nordman, who apparently left Waltham for the press conference in East Hartford while the meeting described in #7 and #8 above was in progress, called Colonel Sciple from the site of the press conference. At that time, Mr. Nordman was told by Colonel Sciple to go forward with the press conference but not

release the written announcement. (Mall Properties, Inc. was informed of the discussion, within the Corps, concerning the possible need to cancel the press conference, Deposition of Robert DeSista, 49). Following this conversation (at some unspecified time and on his own initiative), Mr. Nordman destroyed the press release announcing the decision to deny the application.

10. Mr. Nordman held the press conference. No mention was made of (a) the Colonel's decision, (b) the existence of the Written, Final, Signed Decision denying the permit, and, (c) the fact that Mall Properties, Inc. was given a copy of the decision denying the permit.

11. Since November 16, 1984, only Mall Properties, Inc. and the Corps have been in possession of the Final, Written, Signed Decision. (Deposition of William Lawless, 15; Deposition of Robert DeSista, 58-59).

II

The Secret Appeal Process

Mr. Nordman's announcement at the press conference was a serious distortion of what, in fact, occurred on November 15 and 16, 1984. The public statement issued by Mall Properties, Inc. on November 19, 1984 sought to perpetuate knowingly the distortion. Fully aware of Colonel Sciple's decision, and having been given the Final, Written, Signed Decision denying the permit, Mr. Reisel nonetheless stated that the Corps' "procedure does not reflect negatively on the merits of the application". The deception had been joined publicly by the developers.

Since November 1984 Mall Properties, Inc. -- operating on the most important factual and legal premise of any controversy, namely, the existence and substance of the Signed, Decision -- has pursued a secret appeal process. It has engaged in numerous meetings with Corps officials and documented lobbying efforts in Washington, D.C. The "mitigation measures" formally submitted by Mall Properties, Inc. on June 24, 1985, are the product of that effort. It has been attempting, with apparent care, to quietly reverse a decision of government of which it alone was aware.

The Corps remained silent throughout. It continued to acquiesce in the deception and the secret appeal process. The decision to withhold the Signed Decision from the public (despite a formal request under the Freedom of Information Act in December, 1984), and, instead to release the Draft ROD without any further comments, was without justification and perverted the public disclosure purpose of the law. Given a clear opportunity to tell the truth to the public, the Corps refused.

Mall Properties, Inc.'s effort, with the Corps' acquiescence, almost succeeded. The fact that it was allowed to occur at all has tainted the entire Corps' review of Mall Properties, Inc.'s application and raised serious and important questions about the ethics and legality of the Corps' actions.

In our view, the conduct of the Corps and Mall Properties, Inc., for the past seven months -- during which the Final, Written, Signed Decision was intentionally suppressed -- raises serious, enduring questions about the integrity and credibility of the Corps and the inherent, suspect nature of any continuing relationship between the Corps and Mall Properties, Inc.

III

Questions Raised by the Corps' Conduct

For the reasons set forth above, I formally request that you immediately undertake a detailed, thorough and public investigation of precisely what occurred here, including answers to the following questions:

1. Why did Colonel Sciple fail to disclose to the public his Signed Decision reached after five years of deliberation?

2. Why did Colonel Sciple fail to disclose to the New Haven Register a copy of the Signed Decision when requested to do so under the Freedom of Information Act?

3. What is the legal basis for providing Mall Properties, Inc. with an opportunity to present "mitigation measures" after a Signed Decision was delivered to them, particularly after five years of review and consideration?

4. What occurred between November 15, 1984 -- when Mall

Properties, Inc. was orally informed of the denial -- and November 16, 1984 when Colonel Sciple (following a meeting with Mall Properties, Inc.) decided to suppress and keep secret his final decision?

5. Who may have influenced Colonel Sciple's "change" of position?

6. Who else within the Department of the Army knew or should have known that Colonel Sciple's Final, Written Decision was kept secret from the public but was given to the applicant?

7. Who else acquiesced in or supported the ability of Mall Properties, Inc. to "change" Colonel Sciple's decision and to conduct a secret appeal process from that decision during the past seven months?

We also request that you: (1) prohibit any further review of Mall Properties, Inc.'s application for a Section 404 fill permit and expunge from the record all materials submitted by Mall Properties, Inc. since November 16, 1984; and (2) confirm publicly that Colonel Sciple's Signed, Decision constitutes a denial of the application.

IV

The Harm to the City of New Haven

This controversy should have ended on November 16, 1984. It has been the source of conflict and disagreement throughout this metropolitan region for more than a decade. It has impeded balanced economic growth and regional cooperation.

The conduct of the Corps of Engineers and the Department of the Army -- including those who knew or should have known about the suppression of Colonel Sciple's Signed Decision -- has caused New Haven demonstrable and unjustifiable harm. For the past seven months we have been unnecessarily forced to engage in expensive and contentious legal actions at taxpayer expense in an effort to protect our city. Other members of the public also have expended taxpayer funds unnecessarily, including the State of Connecticut. Moreover, for the past seven months, potential retail development has been deterred from coming to New Haven because of the "presumed" pendency of the Corps' decision on Mall Properties, Inc. and the deceptive announcement by Mall Properties, Inc. on November 19, 1984. The financial loss to New Haven may be incalculable.

I have instructed my attorneys to take the deposition of Colonel Sciple in order to determine what, in fact, occurred in November 1984. That deposition is scheduled for July 12, 1985 unless the government once again seeks to suppress the truth.

Sincerely,

Biagio DiLieto

Biagio DiLieto
Mayor
City of New Haven

cc: Honorable William O'Neill, Governor
Honorable Christopher Dodd (Connecticut)
Honorable Lowell Weicker (Connecticut)
Honorable Bruce Morrison (Connecticut)
A. Bartlett Giamatti, Yale University
Honorable Joseph Lieberman, Attorney General, Connecticut
Colonel Carl Sciple
Stanley Pac, Commissioner, Department of Economic Development
Thomas Riley, Assistant United States Attorney (Connecticut)

RECORD OF DECISION

SUBJECT: Application for a Department of the Army Permit (No. 13-79-561) by Mall Properties, Inc. to place fill in backwaters and wetlands adjacent to the Quinnipiac River in the Town of North Haven, Connecticut, in order to construct a regional shopping center, North Haven Mall:

U.S. ARMY CORPS OF ENGINEERS INVOLVEMENT: The filling of approximately 31 acres of wetlands and open water areas, some of which is tidal, triggers the involvement of the U.S. Army Corps of Engineers' Regulatory Program requiring authorization under Section 10 of the River and Harbor Act of 1899 and Section 404 of the Clean Water Act.

BASIS OF DECISION: While Army involvement results from the proposed filling of waters and wetlands, the decision is based upon a consideration of all factors affecting the public interest.

PURPOSE OF THE RECORD OF DECISION (ROD): The purpose of this ROD is to provide a summarized record of the information used in this permit action.

1. Name of Applicant: Mall Properties Application No.: 13-79-561

2. Purpose, location and character of the proposed mall:

a. The applicant's purpose for the proposed 1.1 million square foot, two floor, North Haven Mall, containing four major department stores (Figure 1), is to promote private sector business engaged in providing goods or services for profit. The public purpose of the proposal is to satisfy a need in the metropolitan New Haven area for retail shopping that provides a concentration, variety and depth of shopper's goods, department store-type merchandise, apparel, and home furnishings, as well as a number of services and entertainment opportunities. The mall's principal market area would include the cities and towns of North Haven, New Haven, Wallingford, Hamden, North Branford, East Haven, Bethany, Woodbridge, Orange, West Haven, Branford, Guilford, Madison, Durham, Middlefield, Meriden and Cheshire. The applicant's proposal seeks to serve this unserved need by developing the North Haven Mall to provide a combination of anchor stores and a diversity of specialty stores.

b. The project site lies along the eastern bank of the Quinnipiac River in the north central portion of North Haven, Connecticut about 9 miles north of the City of New Haven (Figures 2-5). It is located near interchanges to Interstate 91 (I-91) and the Wilbur Cross Parkway (CT Route 15), and lies directly adjacent to Valley Service Road and the Amtrak railroad line. Approach road alterations will involve another 6 acres of land.

The cumulative projected traffic increases on Bishop Street, with the incremental increases generated by the mall would not have a significant impact on the small portion of the potential North Haven Bridge Historic District that fronts on Bishop Street.

3) As discussed in our EIS, we anticipate no adverse cumulative effects related to air quality, noise impacts, local utilities and services, and energy consumption.

4) Many concerns were raised during our process that the quality of life in New Haven and North Haven would be altered. Although the overall character of the communities may not be immediately altered, those persons directly impacted (i.e. by increased traffic on neighborhood streets or through loss of a job) will experience a perceived change in the quality of their life.

5) As discussed in our EIS, construction of the mall will induce ancillary retail growth and development near the site. This would reinforce the area as a commercial corridor and improve its competitive position.

11. Environmental Impact Statement:

Our FEIS with referenced materials,and the comments received in response to it, are hereby adopted, and it is my conclusion that the FEIS has adequately addressed all significant environmental issues and considered all reasonable alternatives.

12. A review of the project under the Section 404(b)(1) Guidelines was a part of our FEIS. That review is hereby adopted as our final evaluation, and I conclude that the project complies with the 404(b)(1) Guidelines.

13. Conclusions:

a. Throughout our review of this project it has been apparent that a major concern is related to socio-economic impacts, in particular, those affecting the city of New Haven. There is no question that New Haven provides services and an environment for a community with a sizeable low to moderate income population. This population is less able to travel to reach services at other locations. It is more dependent upon a vibrant, viable city to provide services and a healthy, safe and desirable environment.

b. New Haven had been on the decline. Now however, there is a renewed confidence in New Haven as evidenced by the current major construction and rehabilitation projects and a continued committment by the United States Department of Housing and Urban Development to improve the Social and Economic climate in the city. The city is experiencing a resurgence and private investors are making and fulfilling committments. This turnaround and upswing is still fragile, though the degree of this fragility is subject to varying opinions. The construction of the North Haven Mall has the potential for drawing away some of the existing downtown businesses, but more significantly, thos in the future that are important to the city's continued positive trend.

c. We acknowledge the demand for a facility such as the North Haven Mall to meet the desires of the market area. More mobile shoppers would have a more convenient facility, the applicant would realize a profit and the town of North Haven would gain increased revenues. At the same time negative impacts on the quality of life in North Haven is an outcome some forsee.

d. A second important factor upon which this decision is based is the irretrievable loss of 25 acres of wetlands, 7 acres of which are particularly valuable in providing good wildlife habitat and food chain production.

e. A third factor is the cummualtive impact from other past, present and reasonably forseable future actions affecting wetlands, floodplains and flooding.

14. I have considered all factors affecting the public interest, and after weighing favorable and unfavorable effects as discussed in this record of decision, I conclude that a greater public interest would be served by allowing New Haven to continue its revitalization without the inherent risk posed by the applicant's proposed mall. I therefore, find it in the public interest, to deny this permit.

15 Nov '84

DEPARTMENT OF DEFENSE
UNITED STATES OF AMERICA

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, DC 20310-0103

23 JUL 1985

Honorable Biagio DiLieto
Mayor of New Haven
New Haven, Connecticut 06510

Dear Mayor DiLieto:

Thank you for your recent letter to Secretary Marsh concerning the evaluation of the application by Mall Properties, Incorporated, to construct a mall in North Haven, Connecticut. Secretary Marsh has requested that I investigate your allegations of misconduct by the New England Division, Corps of Engineers, and respond to you on his behalf.

I have evaluated the circumstances described in your letter concerning the November 1984 Record of Decision and the division engineer's subsequent decision to grant the applicant additional time to modify his project. I can find no basis for your conclusions that the division engineer had made his final decision, that he acquiesced to a public deception and that he has been party to a secret appeal process.

The Corps of Engineers often is placed in the difficult task of looking at the needs of an individual as well as the overall public interest. The decision to deny a Department of the Army permit for any applicant is a serious matter since it restricts the party's use of its own property. It is common practice by all field offices of the Corps when denial of a permit is anticipated to provide the applicant with an explanation of why denial may appear warranted and an opportunity to modify the project sufficiently so that it no longer is contrary to the public interest. The Corps believes that this is the most equitable means of discharging our statutory obligations.

In the instant case, the division engineer had signed a record of decision and explained its content to the applicant. He had not, however, made a final decision to deny the permit. The Corps permit regulations at 33 CFR 325.2(a)(6) state in part that:

> "The SOF (Statement of Findings) or ROD (Record of Decision) shall be dated, signed, and included in the record prior to final action on the application."

Section 325.2(a)(7) goes on to state, in part, that:

> "If the final decision is to deny the permit, the applicant will be advised in writing of the reason(s) for denial...Final action on the permit application is the signature on the letter notifying the applicant of the denial of the permit or signature of the issuing official on the authorizing document."

No such letter has yet been prepared for this application.

With regard to your charge of a public deception and a secret appeals process, I can find no evidence that routine procedures have been circumvented. All available information had been made available for public review through public notices, a public hearing and the draft and final environmental impact statements. The Corps regulations at 33 CFR 325.2(a)(2) require the Corps to issue supplemental, revised, or corrected public notices if, in its view, the changes involved would affect the public's review of the proposal. The Corps Regulatory Guidance Letter (RGL) No. 83-11 further clarifies that if the scope of the project is reduced (i.e., thereby reducing possible adverse environmental impacts), the district (division) engineer normally will not issue a revised public notice.

As you recognized in your letter, the additional information and modifications to the Mall Properties, Incorporated, application were submitted to the New England Division on June 24, 1985. I understand that the division engineer is reviewing the new submittal and will determine shortly whether another public notice is warranted. Since the submittal of the additional information and modifications is consistent with Corps policy, the Corps cannot expunge it from the administrative record.

Thank you for bringing your concerns to Secretary Marsh's attention. We understand your position on this application. The answer to each of your specific questions is that a final decision on this application has not been made and, therefore, all policies and procedures described in 33 CFR 325 are applicable. I have sent a copy of your letter and added my own urging to the Corps that they proceed to final decision on this application in a manner that is fair and equitable to all concerned parties.

Sincerely,

Signed

Robert K. Dawson
Acting Assistant Secretary of the Army
(Civil Works)

ADDITIONAL QUESTIONS FOR MR. DAWSON

Question from Senator Chafee: The Department of the Army had proposed changes to the Corps of Engineers National Environmental Policy Act (NEPA) Regulations in 1984. On February 25, 1985, the Environmental Protection Agency (EPA) wrote the Council on Environmental Quality (CEQ) charging that the regulations would have unsatisfactory impacts on the quality of the environment.

- Would you please comment on the points raised in Administrator Thomas' February 25, 1985, letter and the attached materials?
- Would you please explain why Army has requested four extensions of time to respond to EPA's criticism?

Response: In Mr. Thomas' February 25, 1985, letter, he raises four concerns about the proposed revisions to the Army's NEPA regulations:

1. scope of analysis
2. alternatives review
3. length of EIS
4. monitoring and mitigation

We have resolved with EPA issues 3 and 4 above through several meetings since Mr. Thomas' letter. We intend to continue meeting with EPA staff to resolve issues 1 and 2 above. The letter from Mr. Thomas is a detailed statement of EPA's views at that time. Since the Army has not finalized discussions with EPA or responded to CEQ, a formal statement should be sent to those agencies when discussions are completed. We can certainly provide a general statement. The Army is, through proposed rulemaking, attempting to implement the "rule of reason" that has developed in the Federal courts regarding NEPA reviews. EPA in the legal analysis attached to Mr. Thomas' letter accurately notes that a change in the Corps regulations for issues 1 and 2 above is appropriate. The difference of opinion between Army and EPA is the implementation of the "rule of reason." It is also significant to note that the CEQ proposed in the August 9, 1985, Federal Register to delete the "worst case analysis" from their NEPA regulations. This CEQ effort is based on the evolving "rule of reason" also.

It is obvious from a careful reading of EPA's legal analysis and the CEQ proposed changes that implementation of the recently evolving "rule of reason" is appropriate. Army will only take final action on the proposed changes after appropriate coordination with EPA and CEQ. We expect to further clarify our views to EPA and find some resolution to the outstanding issues.

The second part of your question relates to the four requests for extension of time for Army's response to CEQ. The four requests are a result of a conflict between Army's desire to be responsive and the press of business. Army has asked for short extensions so that resolution of the issue would not be delayed too long. However, the limited staff resources have been constantly placed on other priorities including preparation and response to the 404 oversight hearings. Army feels these oversight hearings have been helpful in providing an interchange of views on the 404 program, but they have also been time consuming and staff intensive, which has delayed action on many pending items including response to CEQ on NEPA.

MICHAEL L. STRANG
3D DISTRICT, COLORADO

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1985 SEP 20 AM 9 20

September 18, 1985

The Honorable John H. Chafee
Chairman
Subcommittee on Environmental
Pollution
Room 408 Hart Senate Office Bldg.
Washington, D.C. 20510

Dear Chairman Chafee:

Enclosed is a copy of a letter I have received from the Colorado Farm Bureau regarding the concerns western farmers and ranchers continue to have regarding the impact Section 404 of the Clean Water Act has on agricultural activities.

In the course of your oversight hearings on Section 404, I would appreciate it if you would give serious consideration to the concerns and needs of farmers and ranchers. I certainly join in the remarks from the Colorado Farm Bureau. Assisting with disputes between the Corps of Engineers and farmers, ranchers and local government officials in my Congressional District in Colorado has consumed a good deal of my time in the past nine months.

I believe firmly that the requirements of agriculture and local governments to respond to emergency conditions and circumstances is not sufficiently addressed in Section 404. The Colorado Farm Bureau letter cites a few specific examples. I can assure you there are many more examples.

While I realize your Environmental Pollution Subcommittee has been concerned about possible lack of enforcement of Section 404 in general, I ask that you give close scrutiny to the special problems of agriculture and local governments in meeting their needs and responsibilities in a timely and responsible manner. Certainly you would agree that common sense and understanding must be major factors in any regulatory scheme. They are sorely needed in this instance.

I respectfully request that my comments and the enclosed letter from the Colorado Farm Bureau be included in your hearing record on this subject and that in the course of developing possible amendments to Section 404, consideration be given to our collective concerns.

With best wishes,

Sincerely,

Michael L. Strang
Member of Congress

MLS:jh

Enclosure

colorado
FARM BUREAU

2211 West 27th Avenue P.O. Box 5647 Denver, Colorado 80217 Phone (303) 455-4553

August 29, 1985

U.S. Congressman Mike Strang
Longworth House Office Building 1331
Washington, D.C. 20515

Dear Mr. Strang,

The Colorado Farm Bureau, as an organization representing 15,000 families throughout Colorado, feels there exists a definite need to make changes in the federal government permitting system for land disturbing activities associated with bodies of water.

I am referring to Section 404 of the Clean Water Act, which authorizes the U.S. Army Corps of Engineers (COE) to regulate the discharge of fill material into the nation's waterways. Permits, I understand, are not required for "normal farming activities" such as harvesting or tilling. However, many other farming activities take place near rivers, streams, lakes and wetlands. A 404 permit is apparently required for certain land-disturbing activities that discharge a fill material into the water body.

The concern of our members is the permitting process now in place. I've enclosed Farm Bureau policies regarding 404. See Water Quality #621 and Corps of Engineer's Authority #627.

Let me identify several specific elements:

1) Rivers and streams throughout Colorado flood annually and cause millions of dollars in private property damages. Much of the damage is to cropland, pasture land, improvements, roads and bridges. Landowners need to be able to protect their property from economic losses due to flooding and bank erosion.

2) The permitting process is too difficult and time-consuming. The average time required for an applicant to receive a permit is 60 days. The applicant must fill out a completed form or the permit is delayed. Detailed information must be provided. Adjoining landowners who may be impacted must be identified. A public notice is made available for all persons to comment. State and other federal agencies can cause a permit denial. The Environmental Protection Agency or State Health Department may see a potential for water quality degradation and cause an automatic denial. An endangered or threatened species present can be a cause for permit denial.

   Once a permit is granted, all kinds of conditions are imposed on the applicant. Criteria for a permit includes best management practices and stream bank control activities. Reports published by the COE dealing with stabilization and stream management, i.e., "Stream Bank Erosion Control Methods," cannot be applied to the

Uncompahgre River successfully. Those principals deal with slow flowing gentle streams and are nearly useless on the Uncompahgre River. Likewise, the Elk River has unique conditions which the COE and other agencies need to understand better. These management practices need more review and critique with more imput by landowners and citizens who understand the nature and history of the rivers involved.

We are concerned with developing a system which will protect the total resource to the best of man's ability-not with preserving the present system which is so often counter-productive of this goal.

3) The COE does not consider the loss of private lands from flooding as an emergency and therefore landowners are not allowed to take any actions, that are inconsistent with 404, to protect the lands from streambank erosion. Emergencies occur only when loss of life or loss to land improvements is likely to happen, and then the permit can take three days or more to process. In the meantime, landowners sit idle while losses mount.

4) Our members recognize the COE has the authority, through Section 404, to require permits. But on top of that, EPA, the U.S. Fish and Wildlife Service, Colorado Department of Health, and the Colorado Division of Wildlife seem to think they are the only experts on land management practices. Landowners claim that these agencies do not understand the use of certain farming practices as a means to protect their property against flooding. Landowners know which practices work best simply because they are working the land almost daily and they can see the results. This discussion then leads to some obvious differences in opinion of good management practices.

Streambank protection or improvement is valued quite differently by those who are concerned only with protection of water quality, fish and wildlife, and aesthetic values. Farmers and ranchers, now experiencing a depressed agricultural economy, are threatened with high economic losses if they are not permitted to establish bank protection when necessary.

Over the last few years, rivers like the Elk and Uncompahgre have been experiencing severe flooding and ultimately high land losses. Once the landowners attempt to protect their property, the environmental community immediately criticizes the protection practices. The obvious difference appears that the environmentalists want only streamside vegetation or protection of riparian habitat for fish and wildlife enhancement. Landowners, on the other hand, see the use of streambank stabilization, such as rocks, rip rap, concrete, and trees, as a means to reduce property and financial losses.

One thought I'd like to mention is a growing opinion that county commissioners should be given authority to permit dredge and fill activities. The Colorado Farm Bureau is now reviewing its policies and will take a serious look at this idea.

In closing, Colorado Farm Bureau urges the COE, EPA, FWS, state agencies involved, and environmental groups to recognize these concerns so that these problems can be addressed and a satisfactory solution can be reached.

Thank you for the opportunity to comment.

Sincerely,

Ray Christensen

Ray Christensen

RC/jb

cc:	Forrest Frentress,	CFB State Board Director, District 10
	Bill May	Routt County Farm Bureau
	Lannie Denham	Montrose County Farm Bureau President
	Mark Maslyn	AFBF Assistant Director National Affairs
	Dennis Stolte	AFBF Assistant Director National Affairs
	Shirley Woodrow	Congressman Strang's Grand Junction office
	Colorado Congressional Delegation	

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EXECUTIVE DIRECTOR
ELLEN JOHNCK

May 30, 1985

The Honorable Senator John Chafee
Chairman
Senate Committee on Public Works
U. S. Senate
Washington, D. C. 20510

Subject: Testimony for May 21, 1985 Hearing on Section 404 of the Clean Water Act; Request that the following testimony be incorporated into the written record.

The Bay Planning Coalition is a non-profit association of San Francisco Bay maritime industry and shoreline property owners who frequently are permit applicants to the state and federal regulatory agencies. Our aim is to ensure a fair and reasonable permit process for projects in the Bay and along the shoreline, and in addition to minimize costs, delays, and uncertainty in this process.

In the spirit of the goals of regulatory reform, which were first promulgated by the Presidential Task Force on Regulatory Relief in 1981, we request that you thoughtfully review the U. S. Army Corps of Engineers Section 404 permit program in light of the Task Force's recommendations.

The Task Force on Regulatory Relief proposed a number of administrative reforms to reduce unnecessary regulatory burdens in the 404 program. We applaud such reforms, specifically the recommendations to:

(1) decide most permit applications within 60 days;

(2) streamline the existing agreements between the Corps and other Federal agencies to minimize the number of applications elevated for higher review;

(3) increase the number and type of activities covered by general permits;

(4) reduce the complexity within the Corps own regulations which may tend to impede the reform measures;

(5) clarify the scope of the section 404 permit program.

We support the goals of the Clean Water Act and the 404 permit program, but we believe that the implementation of the program has fallen short of fulfilling the above-stated recommendations and is deficient in the following areas:

A. The chief problem centers on the application of the wetland definition specified in Part 323.2 of the Corps regulations (Federal Register Vol. 47.No. 141, Thursday, July 22, 1982). This definition determines Corps jurisdiction over parcels located in "waters of the United States" for Section 404 permits:

> " (c) The term 'wetlands' means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

There are several areas which have been diked off from San Francisco Bay during the last century for agricultural purposes and over which the Corps has now claimed 404 jursidiction. It is dubious whether these diked-off areas are actually wetlands within the context of the above definition.

To our knowledge, there does not now exist regulatory guidance as to how this definition is to be interpreted, other than the attached "Regulatory Guidance Letter 82-2, Clarification of 'Normal Circumstances' in the Wetland Definition' (DAEN-CCE/DAEN-CWO-N).

It seems apparent from a reading of "Letter 82-2" that it is the intent of the wording 'under normal circumstances' to establish 404 control over "only truly aquatic areas" and not "over those areas that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes".

Further, it is our understanding that the intent and spirit of the Clean Water Act is to protect the quality of our nation's waters. Thus logically, it seems appropriate that the scope of Corps jurisdiction over wetlands is limited only to those areas that are now linked and have a strong connection to a body of navigable water. We do not believe it was the intent of the 404 program to give the Corps jurisdiction miles away from navigable waters in areas which are subject to only occasional ponding from rainfall.

Another question has arisen, and that is must all factors of this wetland definition be present in order for the Corps to determine whether such an area is, in fact, a wetland, or may the Corps make a jurisdictional determination where anything less than all of the criteria are present?

You probably are aware of a case that will be heard by the U. S. Supreme Court this fall, United States vs. Riverside Bayview Homes. In this case the Appellate Court reversed the lower court stating that neither inundation nor aquatic vegetation alone would be sufficient to cause an area to fall within the wetland definition. Both factors must be present, and the former must cause the latter.

Essentially then what is needed is some additional guidance to alleviate the uncertainty that exists over the intent and purpose of the 404 program as it relates to the wetland definition and the scope of the Corps' jurisdiction.

B. The second problem concerns the future relationship between the Environmental Protection Agency and the U. S. Army Corps of Engineers regarding dispute resolution of 404 permits.

We understand that the July 7, 1982 Memorandum of Agreement (MOA) between the Secretary of the Army and the Administrator of the EPA which governs interagency review and dispute resolution procedures has lapsed. It would be most helpful if this agreement could be renewed in the shortest amount of time as possible.

With the MOA in limbo, there is a great deal of uncertainty and confusion over what the role of the EPA will be vis-a-vis the Corps of Engineers. In the meantime, here in the San Francisco Bay region, the EPA is taking a more aggressive role in influencing the implementation of the 404 permit program with no apparent basis for doing so. This unwieldy situation, if not resolved soon, can only lead to regulatory abuse and unfair treatment of applicants.

C. A third area of concern is that once the Corps of asserts 404 jurisdiction, what will be the role for mitigation?

Currently there is not a role for mitigation until after the 404(b)(1) guidelines regarding water dependency and practicable alternatives analysis, have been met. But a consideration of mitigation prior to, or along with, the application of these guidelines, under certain circumstances, may be appropriate. Mitigation could be providing a net benefit to the aquatic wetland system.

It would be helpful if your committee worked with the Federal agencies involved to outline the criteria for when and how mitigation is to be applied in the 404 permit program.

Thank you for your considering these problems. We are hopeful that some constructive action will be taken so that the 404 program can be carried out in an efficient and reasonable manner.

Sincerely yours,

Ellen Johnck

Ellen Johnck
Executive Director

Enclosures

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314

REPLY TO
ATTENTION OF:

11 FEB 1982

DAEN-CCE/DAEN-CWO-N

SUBJECT: Regulatory Guidance Letter 82-2, Clarification of "Normal Circumstances" in the Wetland Definition

SEE DISTRIBUTION

1. This letter will serve as guidance regarding Corps policy on land-use conversion as it concerns regulatory jurisdiction. Specifically, the guidance addresses situations involving changes in the physical characteristics of a wetland which cause the area no longer to be a part of "waters of the United States" for purposes of the Section 404 regulatory program.

2. The current definition of "waters of the United States" delineates "wetlands" as follows, at 33 CFR 323.2:

> The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

The regulations now in force cover the actual discharge of dredged or fill material into "wetlands," as they are a part of the "waters of the United States." However, these regulations do not discuss what effect the conversion of a wetland to other uses (i.e. agricultural) has upon regulatory jurisdiction, once the land-use conversion has been accomplished.

3. Nonetheless, the preamble to the current (1977) regulations does indicate some basic parameters of the intended scope of regulatory

jurisdiction. In discussing the newly revised definition of wetlands, the preamble contains the following statements, at p. 37128 of the Federal Register vol. 42, no. 138:

> Our intent under Section 404 is to regulate discharges of dredged or fill material into the aquatic system as it exists and not as it may have existed over a record period of time. The new definition is designed to achieve this intent. It pertains to an existing wetland and requires that the area be inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation.

Furthermore, the following remarks are made in reference to the substitution of "under normal circumstances" for "normally" in the new definition:

> We do not intend, by this clarification, to assert jurisdiction over those areas that once were wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes.

The discussion on the definition of wetlands concludes with these observations, at p. 37129:

> Finally, to respond to those who expressed concern that our definition of "wetlands" may be interpreted as extending to abnormal situations including non-aquatic areas that have aquatic vegetation, we have listed swamps, bogs, and marshes at the end of this definition to further clarify our intent to include only truly aquatic areas. (emphasis added).

4. It is important to note the following qualification found at p. 37128 of the Federal Register vol. 42, no. 138:

> The use of the word "normally" in the old definition generated a great deal of confusion. The term was included in the definitions to respond to those situations in which an individual would attempt to eliminate the permit review requirements of Section 404 by destroying the aquatic vegetation, and

> to those areas that are not aquatic but experience an abnormal presence of aquatic vegetation. Several such instances of destruction of aquatic vegetation in order to eliminate Section 404 jurisdiction actually have occurred. However, even if this destruction occurs, the area still remains as part of the overall aquatic system intended to be protected by the Section 404 program. Conversely, the abnormal presence of aquatic vegetation in a non-aquatic area would not be sufficient to include that area within the Section 404 program. (emphasis added).

This policy remains in effect, regardless of the substitution of "under normal circumstances" for "normally."

5. Many areas of wetlands converted in the past to other uses would, if left unattended for a sufficient period of time, revert to wetlands solely through the devices of nature. However, such "natural circumstances" are not what is meant by "normal circumstances" in the definition quoted above. "Normal circumstances" is determined on the basis of actual, present use of an area. Thus, it is the Corps' policy that once a wetland area has been converted to another use which alters its wetland characteristics to where it is no longer a "water of the United States," that area will no longer come under the Corps' regulatory jurisdiction. However, if the area is abandoned and over time in fact reverts to "wetlands" meeting our definition at 33 CFR 323.2(c), then the Corps' regulatory jurisdiction has been restored.

6. This policy is applicable to Section 404 authority only, not to Section 10.

7. This guidance expires 31 December 1984 unless sooner revised or rescinded.

FOR THE COMMANDER:

Forrest T. Gay III
FORREST T. GAY, III
Brigadier General, USA
Deputy Director of Civil Works

DISTRIBUTION:
(See page 4)

TESTIMONY OF DR. JESSE A. CHAPPELL BEFORE THE SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION OF THE SENATE ENVIRONMENT AND PUBLIC WORKS COMMITTEE

Mr. Chairman and Members of the subcommittee, my name is Dr. Jesse A. Chappell. I am currently the Director of the South Carolina Aquaculture-Mariculture Program International (S.C.A.M.P.I.) and a research associate at the Belle W. Baruch Institute for Marine Biology and Coastal Research in Georgetown, South Carolina. I appreciate the opportunity to testify before this subcommittee concerning the promise of aquaculture in the historically managed wetlands of the southeastern United States and the regulatory impediments which wetlands management proposals have recently encountered. I respectfully request that this testimony be included as part of the official record of this hearing. For the convenience of the Committee, I have attached a curriculum vitae.

Aquaculture and the Management of Old Southeastern Coastal Ricefields

Aquaculture is defined as the controlled (farmed) production of aquatic plants and animals. It has been practiced successfully for thousands of years. Just as water was once the highway on which our colonial ancestors traveled, it was also the literal life blood of American colonial industry. The original colonies thrived on rice production through an aquatic plant culture system so vast that the Carolinas and Georgia were, for a century and more, the greatest producers of rice in the world. These ricefields now, for the most part, lie fallow and through plant succession are returning to the cypress forests they once were.

The old ricefields in South Carolina and Georgia are not only rich historically but are also some of our most potentially productive soils. Many of the owners of these historic ricefields desire to re-establish aquaculture in South Carolina. Some of the ricefields which have been well maintained over the years are already heavily involved in rice/crawfish aquaculture. Using proven technology, rice is being cultured as a forage crop for crawfish. The crawfish consume the foliage of the rice as their main source of food. The owners of other old ricefields would like to repair and refurbish existing levees (embankments) to their original working condition so that they, too, are able to manage aquatic species in a controlled setting. Existing regulations, and particularly § 404(c) of the Clean Water Act, though not designed to do so, are extremely inhibitory to the establishment or re-establishment of aquaculture.

The Decline in Fish Harvest and the Importance of Aquaculture

About twenty years ago, world harvest of wild fish and shellfish reached a plateau at about 75 million metric tons per annum. Fishery biologists and resource managers from all over the globe agree in predicting that few real and sustained gains in wild fish harvest will be seen in the future. In fact, a great many predict that current and future fishing pressure and methodology will greatly reduce global wild fish yields. With continued expansion of world population and increasing demand for protein, the harvest of natural stocks of fish and shellfish cannot keep pace. We have, in other words, reached or exceeded a maximum sustainable yield in almost all fisheries.

Here in the United States we are consuming more fish and fish products than ever before. As startling as it may seem, we are importing about 65% of the fish and fish products we use. Fishery products are the third largest component of our national trade deficit. In 1983 the value of imported edible and nonedible fishery products set a record at $5.1 billion, an increase of 13% over 1982. Total export value of edible and nonedible fishery products was $1.0 billion, a decrease of 5% over 1982, leaving a deficit of $4.1 billion. Per capita consumption of fishery products was 12.9 pounds, up over 1982 levels by 0.6 pounds. This export/import trend has been developing over several years and is projected to escalate.

Encouraging the creation of "aquabusiness" in the United States will not only decrease our reliance on imported fishery products but will also improve our balance of trade, increase recreational opportunities and create new jobs. A University of South Carolina School of Business Administration study has shown that for each job created in aquaculture, four jobs will be created in secondary and tertiary support businesses.

Scientific Observations Concerning Management of Wetlands for Aquaculture Development

Recent ricefield marshland studies reported in the scientific literature and extensive personal observations all point out that intelligent wetlands management both at inland and coastal zone sites can yield significant and far-reaching benefits to the environment. Not only do well-managed impoundments used for aquaculture provide high quality habitat for several endangered or threatened species, migratory waterfowl and a tremendous variety of other wildlife species, but they also, of necessity, maintain high quality aquatic environments for the rice and crawfish or fin fish being produced in the aquaculture enterprise. In contrast, unmanaged and/or open (breached) ricefield impoundments have been clearly documented to hold or produce substantially and significantly fewer wild animals and varieties of plant life than do managed systems.

An example will illustrate the comparative benefits of intelligent wetlands management. The amount of energy fixed in the phytoplankton-based food web of the managed impoundment, over time, far surpasses that fixed by the rooted macrophytes invariably found in the unmanaged or breached impoundment. Even though phytoplankton, zooplankton and diatoms, etc. produced in managed environments are minute by comparison to the rooted macrophytes, their sheer numbers produced over time result in far greater amounts of more directly useable energy being fixed. In addition, the planktonic organisms which flow out of controlled systems are often directly used by larval fish and shellfish. Their waste products contain the same cellulose compounds found in the "marsh detritus," but in forms much smaller in particle size and therefore is much more usable as a detrital food source for those animals who require it.

In the uncontrolled ricefield systems, dissolved oxygen levels, biological oxygen demand (BOD), pH and temperature combine to bring about an extremely poor environment for aquatic, terrestrial and avian species alike. Buildup of BOD by rotting plant foliage, mud respiration and animal and plant respiration results in chronically low dissolved oxygen levels only short distances from manmade or natural waterways. Low dissolved oxygen and low pH couple to cause anaerobic conditions to exist in the unmanaged or uncontrolled (breached) ricefield impoundment. These conditions drastically slow the natural digestive process through which bacteria, fungi and molds break down plant litter to form the "detritus" that is claimed to feed the larvae of fish and shellfish in estuaries. These poor conditions may explain why the use of unmanaged or open ricefield impoundments by freshwater and marine fish and shellfish as nursery areas is poorly documented at best. Certainly, some such use does occur, but larval forms of most fish and shellfish generally require higher quality environmental conditions for survival and well-being than they find in unmanaged ricefield impoundments.

Aquaculture undertaken in a controlled environment, on the other hand, brings about production of more useful food organisms, a broader-based trophic structure and a better quality aquatic environment than is possible in breached ricefield impoundment areas. Indeed, the term "aquabusiness," by its definition, suggests that the owner of managed wetlands is producing and selling a product he could not possibly produce in commercial quantities unless a superior quality aquatic environment is established and maintained. To maintain a high quality environment in the production of aquatic plants and animals the owner/operator must carefully monitor and manage his water system daily to do so. (Aeration, circulation and water exchange are his only tools.) Waterflow from such a production system will, in almost every case, be superior in quality to the water found in nearby unmanaged or open ricefields.

The U.S. Fish and Wildlife Service and almost every state fish and wildlife agency have built and continue to build impoundments in many types of terrain, including wetlands and ricefields. Some of the wetlands which these agencies have impounded had not previously been disturbed. If the impoundment of such lands is so catastrophic, why should the fish and wildlife agencies not be required to lock their water control structures open, turn off their pumps or dynamite their levee systems? The reason such action is unwarranted is that the impoundments and the management regimes they permit serve extremely valuable functions benefitting people, wildlife and fisheries.

The Role of Aquaculture in Enhancing Our Ability to Manage Our Resources

At a time when fish, wildlife and the environment are receiving more and more pressure from the public in many ways, it seems foolish, even ridiculous, to avoid developing new techniques for managing the natural environment and wildlife. This is exactly the time when we urgently need to set beneficial management precedents in order to stimulate more effective management practices. We must learn to better understand and manage our natural resources so that our children and their children will not only have wholesome food to eat but will also have the privilege of enjoying fish and wild animals in the field.

We learned long ago that we can produce grain crops to better feed ourselves, and that Mother Nature could not be depended upon to supply our food and shelter needs indefinitely in any one place. Even with hordes of wild buffalo, waterfowl, or passenger pigeons at our disposal, our forebears quickly began to farm beef, pork and poultry animals to have a reliable supply of meat available.

We know now that our wild fisheries are much the same as terrestrial animal populations: they are finite in number and sensitive to harvest pressure imposed by man. If we can manage our wild or natural fisheries at or near a maximum sustainable yield, we will have succeeded in part. The remaining differences between human demand for fish and the supply available from wild stocks will have to come from aquaculture. How we choose to encourage aquaculture development across the United States and the value we place on it therefore will have a great bearing on whether in the future we remain among the strongest and most progressive nations because we have an abundance of high quality fresh water and food.

Aquaculture projects employing old ricefields are among the most promising proving grounds for the next essential step in the evolution of beneficial forms of environmental management. They are particularly attractive for this purpose because they are quickly and easily implemented. And, in the event some unforeseen environmental detriment results from management of these wetlands, the process of refurbishing a levee system or water control structure may readily be reversed. In these circumstances, a conservatively structured industry that can, on only 5,000 acres of land/pond area, produce a volume of product equal to the entire annual South Carolina shrimp harvest cannot and should not be ignored or (perhaps worse) regulated to death.

Finally, I wish to note that the private landowner is and always has been the most valuable resource that managers of fish and wildlife have. It seems appropriate to strive to inform the layman landowner of proven wildlife and fisheries management practices, rather than to view him as the enemy or someone who is incapable of understanding the management technology used today.

Constraints on Aquaculture Development

The Joint Subcommittee on Aquaculture of the Federal Coordinating Council on Science, Technology and Engineering prepared the National Aquaculture Development Plan (NADP) Volumes I-II, at the direction of Congress pursuant to the National Aquaculture Act of 1980. The NADP was set up to be implemented by a number of federal agencies, including the Environmental Protection Agency, the Fish and Wildlife Service and the National Marine Fisheries Service. One of the major themes of the NADP is that existing constraints limiting the development of aquaculture/aquabusiness in the United States are regulatory, not technological.

The most troublesome of these regulatory constraints is the apparent position of at least some elements within the Environmental Protection Agency that the management of wetlands areas inevitably is detrimental to the environment, even where such management has been practiced successfully for more than two centuries. This inflexible position regarding the repair and restoration of levees (embankments) and water control structures is unsupported by current scientific data, and is unreasonable in light of the beneficial and compatible uses available through aquaculture. Further, this attitude, taken to its logical extreme, will preclude the private landowners from repairing existing levees and water control structures damaged by storms and other chance occurrences.

For a landowner in South Carolina to repair or refurbish his private earthen embankments around historic ricefields, he must receive permits or certificates from several state agencies, including the South Carolina Coastal Council. If the landowner's project is permitted by the appropriate state agencies, he must then apply for an Army Corps of Engineers dredge and fill permit. The Corps, in considering such an application, addresses the guidelines established under the Clean Water Act and the public interest to be served by the issuance of a permit. Thus, the Corps must concern itself with the contribution an aquaculture project will make to the human food supply, and whether such a plan is the best and least disruptive use of the natural resource.

Even after a proposed project has been approved by the state agencies and the Corps of Engineers has issued its Notice of Intent to permit, EPA can still ignore the responsible state agencies' judgments as to the appropriate use of natural resources and the Corps' expertise and proceed to veto the issuance of the Corps permit. EPA thus far has not felt it necessary to consider whether the states are better equipped to control and guide land use within their sovereign borders, nor has it shown any inclination to credit the Corps' broad-based analysis of the many factors affecting the public interest considerations that are raised by a proposed embankment repair project.

The broad-brush attacks on well-considered State and Corps findings mounted by EPA, the Fish and Wildlife Service and the National Marine Fisheries Service exemplify their negative attitudes towards aquaculture development. Convinced that management of old ricefields (wetlands) using traditional aquacultural techniques is catastrophic to the environment, EPA is trying both to block the construction of new levees and to eliminate the repair and restoration of old dike and levee systems along the entire southeastern United States coastline. Under EPA's current approach, no coastal lands (freshwater, brackish or salt) can be modified from their existing state by dredging or filling activities, even though the proposed activity may involve nothing more than the repair and refurbishment of existing levees and water control structures that have been in place for one hundred to two hundred years. By this policy, EPA will disallow management activities on properties which have long been subject to extensive and intensive human control and thus will effectively take the property from its owners and make it part of the public domain.

Mr. Chairman, thank you again for the opportunity to testify before you today.

Marin Audubon Society Box 599 Mill Valley, California 94942-0599

July 10, 1985

Honorable John Chaffee, Chairman
Committee on Environmental Pollution
U. S. Senate
Washington, D.C. 20510

RE: ARMY CORPS OF ENGINEERS OVERSIGHT HEARINGS

ATTENTION: BOB HURLEY

Dear Senator Chafee:

This letter addresses the concerns of both the Marin and Golden Gate chapters of the National Audubon Society regarding wetland regulations. Our chapters have a combined membership of 9,000 persons.

We understand the Committee on Environmental Pollution will be conducting a final oversight hearing on administration of Section 404 on July 15, 1985. We request that our comments be made part of the hearing record.

With over 90% of San Francisco bay wetlands now lost to fill and development, strong protections for our remaining wetlands are critical. The Corps of Engineers is the ultimate agency upon which we depend to protect these valuable resources. We have worked for many years with our San Francisco District and know and respect the dedication of many of the District staff. However, their ability to protect wetlands is seriously hampered by certain aspects of the regulatory system.

Enforcement is a major problem. As you are aware, all violations must be referred to the Justice Department for enforcement. This is cumbersome, inefficient and simply does not work to protect wetlands. The San Francisco District has a backlog of 30 to 100 or more outstanding Cease and Desist orders from recent past years. Responsibility for this state of affairs is difficult to determine. The Council for the San Francisco District, as well as his predacessor, have reluctant to refer cases to the Attorney General because violations are small; cases difficult to argue or perceived as unlikely to be pursued by the Justice Department. To our knowledge, the Attorney General has not prosecuted one case involving San Francisco Bay wetlands in the last three years.

A Chapter of National Audubon Society

For some time, we have supported the concept of the Corps having administrative enforcement authority because it would result in more timely, uniform and responsible enforcement. We understand your committee is considering granting authority to levy fines to the Corps for permit violations and to the EPA for illegal fills. While we have some concern about having two agencies responsible (due to decreased efficienty and confusion as to which agency is responsible) this proposal would be more effective than having to rely totally on the Justice Department. Therefore, we support the Corps' assumption of enforcement responsibility for permit violations and the EPA for illegal fills. However, it is important that each agency have sufficient staff to undertake these responsibilities. It is our understanding, that the San Francisco Office of the EPA is particularly understaffed at this time.

In addition, we urge that enforcement regulations be designed to avoid interminable delays. The procedure for enforcement must be concise, straightforward, and allow for timely action. Many wetlands can be lost, administrative time and tax dollars consumed, during the years it can take to exhause appeals and appear before judges that have little or no understanding of wetland resources. While the rights of individual property owners must be respected, wetlands are a resource of nationwide concern and their unnecessary destruction avoided as emphasized in 404 guidelines. To be effective enforcement procedure must be streamlined and enable speedy intervention when a wetland is being destroyed. Once a wetland is filled it is usually gone forever.

In summary, we support amendment to the Clean Water Act which will enable the Corps to levy fines for wetland violations, and further urge the Environmental Pollution Committee to establish straightforward regulations for efficient and timely enforcement. Such regulatory changes would go a long way to ensure better protection of wetlands.

Thank you for considering our comments and recommendations. We are depending on your committee to ensure protection of wetlands under the law.

Sincerely yours,

Barbara Salzman
Conservation Committee
Marin Audubon Society

Arthur Feinstein, Chairman
Conservation Committee
Golden Gate Audubon Society

cc: Senator Alan Cranston
Senator Pete Wilson
Consgresswoman Barbara Boxer
Hope Babcock, NAS

July 9, 1985

The Honorable John H. Chafee
U.S. Senate
Washington, D.C. 20510

Dear Senator Chafee:

Thank you for your letter of June 19 mentioning the oversight hearings you and the Subcommittee on Environmental Pollution are now holding to assure uniform and effective national protection of wetlands. In reviewing Army Corps of Engineers actions in the San Francisco Bay area we find many questionable jurisdictional determinations, a large backlog of cease and desist orders, and practically no follow-up and enforcement of penalties or corrective measures for violations.

We are writing to you and the members of the Subcommittee with some background information and recommendations which we believe will improve the performance of all Corps districts and contribute to the protection of wetlands throughout the nation. Some of our recommendations may appear to be expanding jurisdiction, but we believe they will serve to clarify responsibility and accountability. Many of the problems we have experienced seem to result from ambiguities in the Clean Water Act and Corps regulations. Therefore, we join other Bay Area conservationsists in recommending that the laws and regulations be made so clear that the Corps must abide by them.

The basic definition of wetlands needs to be clarified. Terms like "adjacency" and "hydrologic connection" do not clearly cover, for example, those wetlands behind two dikes or wetlands where there is no channel to the bay. The U.S. Fish and Wildlife Service definition is unequivocal and has proven effective. It would best serve the purpose of protecting wetlands, and we urge that you work for its inclusion in the Clean Water Act.

The practice of discing is a major cause of loss of wetlands throughout the San Francisco Bay area, and we find the Corps regulation 323.4(D) (July 22, 1982) is ambiguous about the practice. Interpretation of Counsel for the SF Corps District is that the Corps does not have authority over discing as discing does not represent " fill". The loop-hole is that permit requirements for redistribution of soil not undertaken for purposes of agriculture are not specifically discussed in the regulations. Potential developers of wetlands, which have never been and will never be in agriculture, use discing as a means to remove wetland vegitation, change elevations, and eliminate ponding. With the Corps claiming they have no jurisdiction, the wetland is lost forever.

We recommend that the Corps definition of "fill material" (section 323.2,(7), k and l) be expanded to include material which is already on site. There should also be a specific statement that any action such as discing that is not undertaken for the primary purpose of crop production but that redistributes surface materials in any manner that changes an aquatic area to dry land requires a permit.

Wetlands protection should not be tied solely to waters of the United States as described under 323.2(a). Section 323.2(a)(3) should be expanded to include the needs of wildlife for clean water. Protection of habitat at least for migratory species which are protected under International Migratory Bird Acts is essential. Another approach is to expand the definition of "recreational purposes" (323.2(a)(3)(i)) to include some specific examples such as birding, which certainly is a recreational pursuit that motivates many to interstate and foreign travel.

Enforcement of Corps orders is another major problem. At the present time, the Corps must refer all cease and desist orders to the Justice Department if violators do not voluntarily comply. However, many cases have never been referred--often because they are too small or out of concern that an unfavorable ruling would set a critically damaging precedent. We recommend that the Corps be given the option of an administrative abilty to levy fines. The power to fine would at least enable the Corps to follow-up on enforcement of smaller cases. It would also clearly define responsibilities so that concerned citizens could monitor compliance and apply local pressure on the Corps when appropriate. At minimum, the ability to take administrative action directly would enable better enforcement for apparently minor violations which often result in major wetland losses.

We would appreciate it if these remarks could be included in the hearing record. We would also like to be informed of any actions which are initiated to strengthen the Clean Water Act and Corps regulations. Thank your for your consideration of these recommendations.

Sincerely,

Patricia M. Mulvey

Patricia M. Mulvey and James J. Mulvey
527 Rhodes Drive
PaloAlto, CA 94303

Copy to: Hon. Alan K. Simpson, Hon. Steve Symms, Hon. Gordon Humphrey, Hon. Dave Durenberger, Hon. Gary Hart, Hon. Daniel Patrick Moynihan, Hon. George J. Mitchell, Hon. Frank R. Lautenberg, Hon. Robert T. Stafford, Hon. Alan Cranston, Hon. Pete Wilson

NATIONAL WILDLIFE FEDERATION
1412 Sixteenth Street, N.W., Washington, D.C. 20036 202--797-6800

STATEMENT OF THE
BASS ANGLERS SPORTSMAN SOCIETY,
ENVIRONMENTAL DEFENSE FUND,
NATIONAL AUDUBON SOCIETY
AND
NATIONAL WILDLIFE FEDERATION

ON THE NOMINATION OF
ROBERT K. DAWSON
AS
ASSISTANT SECRETARY OF THE ARMY
(Civil Works)

SUBMITTED TO THE
SENATE COMMITTEE ON ARMED SERVICES

September 12, 1985

Prepared by:
Robert P. Davison, Ph.D.
Fisheries and Wildlife Division
National Wildlife Federation

Mr. Chairman and Members of the Committee, the Bass Anglers Sportsman Society, Environmental Defense Fund, National Audubon Society and National Wildlife Federation present the following statement on the nomination of Mr. Robert K. Dawson for the position of Assistant Secretary of the Army for Civil Works.

Our organizations believe in the wise utilization of our nation's natural resources. Conservation of wetlands has been a particularly high priority of our members because of the vital role these areas play in the survival of many species of fish, wildlife, and shellfish and because of their importance in improving water quality, performing waste treatment, reducing the effects of floods and storms, and recharging underground water supplies. Recent estimates by the U.S. Fish and Wildlife Service (FWS) and the Office of Technology Assessment have underscored greatly the need for more effective conservation of the nation's remaining wetlands.

As Deputy Assistant Secretary of the Army (Civil Works) from May 1981 to May 1984 and then Acting Assistant Secretary (Civil Works) to the present time, Mr. Dawson has been largely responsible for the Army Corps of Engineers' implementation of Section 404 of the Clean Water Act, which is this nation's principal tool for conserving wetlands. The importance of the Section 404 program to the natural resources of our country and the role Mr. Dawson has played in shaping this program over the past four and a half years compel us to come forward today to present this statement. It is without precedent in the history of the National Wildlife Federation.

Our Position on Confirmation of Mr. Dawson

Our organizations oppose the confirmation of Mr. Robert K. Dawson as Assistant Secretary of the Army (Civil Works) in the strongest possible terms. We do not make such an unqualified recommendation lightly. For instance, the Federation has **never** before opposed a President's nominee for an executive agency. However, in Mr. Dawson's case there is a long substantive record available by which to judge his performance and commitment in implementing Section 404 of the Clean Water Act. Additionally, a number of the more troubling aspects of Mr. Dawson's record have been the subject of no less than three oversight hearings by the Senate Committee on Environment and Public Works. A fourth such hearing is scheduled for next week. This record shows that Mr. Dawson has an overt hostility to protection of wetlands under Section 404, a law that in fact is intended to protect wetlands and a law that he is sworn to uphold. For this reason our organizations oppose Mr. Dawson's nomination as the primary supervisor of the Army Corps of Engineers.

For example, Mr. Dawson presented written testimony and stated in oversight hearings on May 21, 1985 that:

- "One significant point to recall is that the Congress did not design Section 404 to be a wetland protection mechanism and it does not function well in that capacity." [1]
- "...404 is a poor mechanism to protect wetlands." [2]
- "The Congress has never addressed the issue of wetlands jurisdiction . . . We believe the issue of wetland jurisdiction of the CWA demands appropriate legislative direction." [1]

These statements are inimical to the congressionally-identified goals of this key provision of the Clean Water Act, and they are at odds with the positions taken by the leadership of the Senate Environment Committee, which has jurisdiction over Section 404. Consider these responses by Senators John H. Chafee and Robert T. Stafford on June 10, 1985 to Mr. Dawson's testimony:

> Senator Chafee: "Well, I don't know who told you that, Mr. Dawson, but you ought to read the legislative history of the 1977 Clean Water Act amendments. You can start on page 644

> of the Senate volume, which reads, and I quote to you, . . . 'The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of Section 404 has attempted to achieve.'" [3]
>
> Senator Stafford: "My concern over this issue has been increased considerably by the testimony at the May 21st hearing that was given by Robert Dawson, the Acting Assistant Secretary of the Army for Civil Works, the civilian arm of the Corps of Engineers. I know Mr. Dawson disagrees, but as one Member of the Congress who has had more than a passing interest in the Clean Water Act of 1972 and 1977, I can assure Mr. Dawson that it was the intent of the Congress that wetlands are important and are to be protected under Section 404 of the Clean Water Act. For an agency as important to this task as the civilian arm of the Army Corps of Engineers to hold otherwise is to frustrate the very goals of the Act." [3]

With regard to Mr. Dawson's position that "Congress has never addressed the issue of wetlands jurisdiction," the Justice Department of this Administration has stated in its brief before the Supreme Court that the "conclusion that it is 'not clear' that Congress wanted the Corps to exercise the broadest possible jurisdiction over the Nation's wetlands is simply untenable when examined in light of the legislative history." [4]

If there is any uncertainty that may exist over what waters are protected by Section 404 it is because of the statements and regulatory changes made by Mr. Dawson and others in the office of the Assistant Secretary. The Corps' Wilmington District Engineer said it best, "The prevailing uncertainty over jurisdictional extent of the law is perhaps one of our own making because of our seeking, through nationwide permits and other means, a justification for limiting the jurisdiction of the Clean Water Act to some boundary less than the full breadtn of the wetlands found in the term 'all waters of the United States'." [5]

The Dawson Record

Mr. Dawson's positions regarding the Section 404 program not only are diametrically opposed to those of the leadership of the

Environment and Public Works Committee and the Justice Department, they also have produced nearly continuous confrontation over the past four years with the Department of the Interior and the Environmental Protection Agency, as well as with many, and at times a majority, of the state fish and wildlife, natural resource and environmental protection agencies. Moreover, in the three hearings to date before the Senate Environment and Public Works Committee, Mr. Dawson has demonstrated a nearly complete intransigence toward problems in his administration of the Section 404 program that have been identified by the Committee, the Department of the Interior, and the Environmental Protection Agency. This refusal of Mr. Dawson to veer from his own, one-sided regulatory reform agenda regardless of its impact on the environment or its legal validity, has forced the Senate Environment Committee to schedule a fourth hearing on September 18 and to pledge that "We are just going to stick with this until we get these matters settled, . . . and get this program doing something." [3] The remainder of this statement documents the Dawson record and the adverse environmental effects of his approach to regulating activities in wetlands and other waters.

Mr. Dawson Attempted To Eliminate The Wetland Protection Keystone Of Section 404

By law the Corps of Engineers shares with the Environmental Protection Agency the responsibility for protecting wetlands. Section 404(b)(1) prohibits the Corps from issuing permits for wetlands fills except in compliance with regulations promulgated by EPA. Section 404(c) authorizes EPA to prohibit any discharge site if the fill will have an unacceptable adverse effect on water supplies, fisheries, wildlife, or recreational areas. Notwithstanding express congressional intent that EPA play a major role in the 404 program, Mr. Dawson has continually attempted to shunt EPA aside in this zeal to grant permits.

In November 1982, then Deputy Assistant Secretary Dawson wrote EPA Assistant Administrator Eric Eidsness with his request that EPA's Section 404 environmental regulations be relegated to an advisory status so that the Corps would no longer be bound by EPA's requirements in making decisions on permit applications. Such a change would greatly diminish EPA's role in the 404 program and relieve the Corps of having to insure that proposed projects satisfy objective environmental criteria. But Mr. Dawson did not stop with that sweeping request. He went on to request deletion of the presumption that upland sites are available for non-water dependent activities -- the operational heart of EPA's regulations -- and more:

> - "Section 230.10(a)(3) states that upland alternatives are presumed to be available for non-water dependent activities. Because of the serious disputes about the meaning of the term and the absence of statutory support, the presumption should be dropped."
>
> - "That same section contains another presumption that discharges at upland sites have less adverse impacts than discharges in aquatic ecosystems. This presumption carries with it substantial risk that objective review would be jeopardized....Absent a statutory requirement, imposing such presumptions goes well beyond the principles of good government..."
>
> - "We can see no justification, for example, to include definitions which appear more appropriately in Army regulations, nor to include the presumptions noted in 2. above, mitigation policy, nor policy on examination of alternatives." [6]

Simply put, Mr. Dawson argued for abolishing the key test in Section 404 permit evaluations which prohibits the unnecessary destruction or alteration of wetlands where practicable alternative sites are available or where the project need not be located in a wetland to meet its objectives (i.e., is not 'water dependent'). For example, the construction of a marina is water dependent, whereas the construction of a shopping mall is not. The immense value of wetlands and the stunning rate at which these resources are being destroyed certainly justify the presumption against development in wetlands. Further, private investors, aware of the presumption and difficulty it would cause in securing a Section 404 permit for certain projects that are not water dependent, have sought alternative sites. Thus, the present EPA environmental guidelines have influenced expectations. Changes in the guidelines, such as those recommended by Mr. Dawson, would alter those expectations and could undo the long-term protection of wetlands.

Nevertheless, Mr. Dawson, undaunted, continues his attack on the water dependency test, testifying on May 21, 1985 that this fundamental precept of the Section 404 program "for the most part, serves little purpose in the analysis of an application under Section 404. It often confuses the issues rather than promotes an objective analysis." [2]

Senator Stafford took strong exception to this in his Committee's hearing on June 10, 1985:

> "I also want to say, again in disagreement with Mr. Dawson, that it is the opinion of this Senator that the water dependency test is the keystone to the goal of preventing unnecessary destruction of wetlands. It serves an important purpose in the analysis of Section 404 permit applications. It is my view, for instance, that we should not be making it easier to fill wetlands for clearly non-water dependent purposes, such as construction of shopping malls." [3]

Attleboro Mall: A Different Way To Dismantle EPA's Environmental Regulations

Unsuccessful at getting EPA to eviscerate its own environmental regulations, Mr. Dawson instead has supervised the re-interpretation of those regulations by the Corps of Engineers in the context of a specific permit application to build a mall in 30 acres of wetlands near Attleboro, Massachusetts.

Mr. Dawson met with the attorneys for the mall developer on July 10, 1984 and assured them that, unless new issues were raised, 70 days would be a reasonable time in which to expect approval of their permit application. In April 1985, Mr. Dawson met with the Massachusetts Association of Conservation Commissions and others to discuss the pending permit application for Attleboro Mall. A month later the Corps' New England Division Engineer decided that the Attleboro Mall permit should be denied because it was not water dependent and a viable, alternative upland site was available only three miles away. But before a final decision was made, Corps officials in Washington made the extremely rare request on April 24 to review the permit application. On May 31 the New England Division Engineer was directed to "reconcile your documentation with the guidance" from Washington and issue the permit, primarily because of the applicant's pledge to build a "repalacement" wetlands somewhere else. [7]

Although Mr. Dawson was involved in at least two meetings concerning the Attleboro Mall permit application prior to April 24, he told Senator Chafee that "it was not my decision to call the matter forward, nor did I call it to my office to make the decision." [3] Given his prior involvement with the Attleboro Mall application, Mr. Dawson's attempt to separate himself from the decision to issue the permit strains his credibility. Indeed, it seems hard to believe that the Acting Assistant Secretary would trouble himself over the amount of time a permit application would take and not over the ultimate decision on the application.

The decision to issue the permit by Corps headquarters was based on the rationale that the applicant's offer of mitigation did away with the need to comply with the presumption in EPA's regulations that practicable alternatives for non-water dependent projects such as shopping malls are available unless clearly demonstrated otherwise. A study contracted by the New England Division Engineer demonstrated that such an alternative did exist. Instead the Attleboro Mall developers were allowed, in effect, to purchase an exemption from the requirements of EPA's environmental guidelines -- a result remarkably consistent with Mr. Dawson's earlier recommendation that such requirements be dropped from the guidelines. In fact, to ignore the water dependency test and grant a permit based on a pledge to build a replacement wetland would turn Section 404 from a wetland protection statute into a wetland removal statute.

Once again Mr. Dawson's decision or, at the very least, his concurrence with the decision by Corps headquarters, is seriously at odds with the other federal agencies involved in the Section 404 program and the Senate Environment Committee. EPA has initiated action under 404(c) to decide whether to prohibit or restrict development of the mall, stating that the adverse impacts from the project are "unacceptable because they are avoidable." [8] EPA has initiated only eight such actions since 1972.

Senator Gordon J. Humphrey wrote in support of EPA's action on Attleboro Mall, stating that:

> "It is my view that Section 404 stands at the center of our national effort to preserve and protect some of our most valuable natural resources. As such it should be administered with those objectives in mind. However, it has become apparent that the Army Corps of Engineers has been less than committed to these important objectives....**In the case of Attleboro mall...I find it particularly disturbing that this decision was made by the Washington headquarters, and that the decision was in direct conflict with the recommendations made by the Corps' New England Division**.... If we continue to issue permits for projects that threaten such needless destruction of wetlands and for which practical alternatives exist, then how long will it be before the nation's remaining wetland resources are all paved over for shopping malls, real estate development and highways? How many more Attleboro's or Westway's will there be? [9]

Craig Potter, former Acting Assistant Secretary of the Interior told the Senate Environment Committee on July 15, 1985 that "the Corps has said, water dependency aside, we believe you can mitigate fully to replace this marshland...The policy in past has been you wouldn't even address that issue if you didn't have a water dependent activity...The Fish and Wildlife Service's feeling is that a shopping mall is not a water dependent activity." [10]

Senator Chafee told Mr. Dawson on June 10 that a new precedent was being set by allowing this project to use "mitigation rather than the alternative site, even though it is not water dependent...I think we are getting off on a whole new dangerous road here." [3]

Mr. Dawson's Proposed Assault On The Corps' Section 404 Regulations

Mr. Dawson personally approved proposed regulatory changes in how the Corps regulates dredged or fill discharge activities in the nation's wetlands and other waters under Section 404 of the Clean Water Act. The proposed rules were published May 12, 1983 (48 Fed. Reg. 21466-21476).

Under the guise of seeking enhanced procedural efficiency, the Dawson proposal instead was an attempt at a major weakening and dismantling of the Section 404 program. The proposed rules were opposed strongly by 39 agencies in 33 states, the Environmental Protection Agency, virtually every major national conservation organization, many state and local organizations, professional organizations such as The Wildlife Society and American Fisheries Society, and more than 1,000 concerned scientists. The proposed rules, which may still be finalized, would:

1. Define terms within the definition of wetlands so that approximately two-thirds of the wetlands in the lower 48 states,

or more than 60 million acres, currently protected by Section 404 -- e.g. bottomland hardwoods, shrub bogs, pocosins and others -- would no longer be protected.

2. Strip the states of their ultimate authority to prevent the issuance of general permits that adversely affect the quality of waters within the state or that are inconsistent with state coastal zone management plans.

3. Distort permit review criteria by inserting inappropriate environmental criteria. For example, the proposal would presume, merely because a permit application is filed, that there is an economic need for the project.

4. Encourage the shortening of the public comment period on permit applications from 30 to 15 days and scrap the requirement that Corps' public notices of such applications alert the public of its right to request a public hearing.

But you don't have to take our word for the devastating impact that Mr. Dawson's regulations would have on the wetland protection and public participation provisions of Section 404. Senator John Heinz wrote Vice President Bush in September 1983 that

> "Among many questionable ideas, the Corps has proposed to define "wetlands" in a way that would entirely remove from federal oversight bottomland hardwoods, much tundra, and wetlands across the nation in the upper levels of floodplains. The Corps also would insert a host of new criteria into permit review that appear to promote development at the expense of environmental protection." [11]

Or consider this small sampling of what EPA and the 39 agencies in 33 states had to say:

> North Dakota -- "We particularly reject your facade of regulatory relief. Plain and simple, what you propose is the removal of necessary environmental safeguards for America's aquatic resources. This is particularly cruel because it comes at a time when the Supreme Court of the United States has declared our wetlands 'a national treasure of nearly the highest magnitude'." (Dale L. Henegar, Commissioner, North Dakota Game and Fish Department)

Ohio -- "...the overall effect of the proposed changes will be a serious weakening of the protection for the biological and chemical integrity of the nation's waters. The proposed changes would also constitute a breach of the statutory requirements of the Clean Water Act." (Ohio Department of Natural Resources)

Indiana -- "It seems grossly inconsistent that the administration in Washington is strongly advocating wetland preservation, while the U.S. Army Corps of Engineers is attempting to abolish one of the most effective methods of wetlands protection... The Assistant Secretary's proposal would "hamstring" the major protective measures intended to be utilized for the best public interest." (Edward L. Hansen, Director, Indiana Division of Fish and Wildlife)

Georgia -- "...the proposed changes will negatively impact fish and wildlife resources in Georgia... the proposed regulatory reforms have gone beyond the point at which they can continue to adequately protect fish and wildlife resources." (Georgia Office of Planning and Budget)

Massachusetts -- "The Commonwealth of Massachusetts continues to be opposed to the apparent trend, reflected by the COE proposed regulations, toward the weakening and reduction of protection for the nation's wetlands ...the newest revisions...will accelerate the loss of wetlands not only in Massachusetts but nationwide." (Massachusetts Executive Office of Environmental Affairs)

Illinois -- "...the changes being proposed...will seriously weaken the regulatory program...and reduce the protection currently being afforded the streams and wetlands of Illinois." (Illinois Department of Conservation)

Michigan -- "The State of Michigan has and continues to object to the arbitrary actions of the Corps in considering that the state has waived certification requirements under federal statute based on promulgated rules." (Michigan Department of Natural Resources)

California -- "The proposed definition is incomplete in terms of meeting the letter and intent of the CWA.... Considerable areas of forested bottomland swamps, tundra, etc. would no longer be considered wetlands." (Don Lollock, California Department of Fish and Game)

Environmental Protection Agency -- "As currently proposed EPA believes this regulation would have environmentally unacceptable results... Because the definitions contained in [the proposed regulation] determine the scope of jurisdiction

> of the Section 404 program and were proposed without our concurrence, these changes are inconsistent with the legal opinion of the Attorney General.'

Despite the strong and widespread opposition to Mr. Dawson's proposed revisions to the Section 404 program, these regulations have not been withdrawn, and Mr. Dawson continues to maintain that some unspecified version of the proposal will still be finalized later this year.

The disastrous May 12, 1983 proposal wasn't the first time Mr.Dawson had provoked a confrontation with EPA, Interior, and the states. In 1982, he was involved in finalizing regulatory changes to the program that were opposed by Interior and EPA. Unfortunately, these agencies had only three days to review the final regulatory package before it went into effect. The adverse impacts of those regulations and Army's nearly complete disregard for the views of the other federal agencies involved in Section 404, prompted Senator Chafee to hold a hearing on July 16, 1982. Senator Chafee concluded that hearing with a strong admonishment to Mr. Dawson:

> "You come in with a crusader spirit, Mr. Dawson, and Mr. Gianelli, your boss, in making it easier, quicker to get these permits. That is not the purpose of the program. The purpose of the program is to save the wetlands in the country. It is not to get permits as fast as you can get them. Sometimes these permits cannot be acquired, processed as quickly as possible. I notice, I think what you say, 60 to 70 days average for the noncontested permit, maybe that can be speeded up, but the objective is to preserve the wetlands of the country. That is the purpose of the Act." [12]

Apparently, Mr. Dawson wasn't listening.

Mr. Dawson's Refusal to Revise Army's Memoranda of Agreement with Interior and EPA

Although the Army has primary day-to-day responsibility for the 404 program, Interior (FWS), Commerce (National Marine Fisheries

Service), and EPA also review 404 permit applications. Disagreement between these agencies and Army over the resource impacts of a permit may result in elevation of a permit to higher administrative levels within the Army for additional review. However, in 1982 Army and Interior, Commerce and EPA signed new Memoranda of Agreement (MOA) that greatly restricted the review agencies ability to protect fish and wildlife and water quality through additional permit review. Since the new agreement was signed, the Army has refused the majority of the requests by the federal resource agencies to elevate disputes to higher level officials.

Former Assistant Interior Secretary G. Ray Arnett has been a vocal and harsh critic of the MOA which has been in effect between Army and Interior since July of 1982. EPA, under William Ruckelshaus and Lee Thomas, was so dissatisfied with its MOA with Army that EPA terminated it, an option Interior did not have in their agreement. Mr. Dawson, on the other hand has been a staunch supporter of the 1982 MOA with Interior and EPA and an insurmountable obstacle preventing revisions to provide adequate protection for the aquatic environment. For those who might question such a conclusory statement, we offer the following record of correspondence by Mr. Arnett, various EPA officials and Mr. Dawson (emphasis added):

> Arnett to Dawson (May 9, 1984): "While the district engineer may elect to issue a permit in spite of Service-documented losses, while stating his reasons for doing so, **we do not believe it is within his authority to contradict our biological findings and use this contradiction to help justify his decision**. This is an erroneous exercise in logic resulting in a flawed decision, and, if used in the future, will cause continued and needless resource losses." [13]

> Dawson response (June 1, 1984): "Your agency's disagreement with the adequacy of that determination is a technical evaluation matter and is not a basis for elevating the decision under our 1982 Memorandum of Agreement (MOA)." [14]

Arnett to Dawson (August 10, 1984): "I am also disappointed that the changes I recommended in the MOA have been interpreted as contrary to the guidance of the Presidential Task Force Report on Regulatory Relief....**I believe that environmental protection is deteriorating because of the deficiencies in the current MOA** and fear that you are following the Task Force recommendations without recognizing their dual goals....I believe that the elevation requests have been eminently reasonable and justifiable, and are intended to protect the public interest in the fish and wildlife resources in question. Yet, **half of the elevation requests were summarily refused** by your agency. An elevation simply means the District Engineer's decision will be reviewed, not necessarily changed. Propriety, alone, would dictate your honoring my requests. I **know of no other instance wherein a simple request of one department official to another is so perfunctorily denied.**" [15]

Dawson response (August 30, 1984): "However, **in the absence of a better indication of environmental harm,** we would be reluctant and I think ill-advised to make significant changes to **an effective agreement,** one which has provided the regulated public much more responsive government." [16]

Arnett to Dawson (October 2, 1984): "Bob, **the occurrence of so many individual projects where the Service has similar concerns** points out the need to review the Corps' environmental documentation and mitigation policies and their implementation....The Service has special expertise in these areas and **its recommendations should not be arbitrarily rejected without cause.**" [17]

Dawson response (October 18, 1984): **"The first issue you raise as a policy matter is that of adequate documentation. I am unaware that such a consideration is within the area of expertise of the FWS** or even that it is subject to policy discussions....Additionally, as in the discussion of your first issue, adequacy of documentation is not a policy matter, it is established through regulation, and writing an SOF [Statement Of Finding] is not an area of expertise of FWS." [18]

Arnett to Dawson (November 7, 1984): "For nearly two and a half years, our Departments have been involved in an exchange of views relative to the Department of the Army's (Army) implementation of our interdepartmental Memorandum of Agreement (MOA). **It is now abundantly clear that further correspondence on this issue is pointless and that Army's regulatory program is so flawed, it is no longer a useable tool to adequately protect wetlands.**

"Furthermore, **of the 23 permits for which elevation was requested but rejected by Army, four have resulted in lawsuits and four have resulted in Section 404(c) actions based on environmental grounds**. This hardly results in a streamlined, timely, or predictable regulatory program, and these were primary goals of the Vice President's regulatory relief efforts." [19]

Dawson response: None

Arnett to Dawson (December 17, 1984): "**Your letter** [October 18, 1984] **essentially "brushes off" the concerns that I believe were carefully documented in my letter**, and this is symptomatic of the lack of agreement we have regarding the procedures outlined in the 1982 indepartmental Memorandum of Agreement."

"I disagree with your findings concerning all of the major points that were addressed in my letter of October 2, 1984. …Regarding the issue of insufficient coordination, **your response appears to contravene the intent of the Fish and Wildlife Coordination Act** (FWCA)…**Your assertion that environmental documentation is not an area of expertise of the Service astounds me**, and I refer you again to the FWCA."

Furthermore, **I cannot believe that you would condone sloppy decisionmaking or the "shortchanging" of commenting agencies by allowing such pitiful examples of decision documentation to see the light of day**.…Will you kindly review this letter and my letter of October 2, and provide a response that is "on target"?" [20]

Dawson response: None

Five months later before the Senate Environment Committee in May 1985, Mr. Dawson remained steadfast in his refusal to revise the principal flaws in the MOA with Interior. Former Assistant Interior Secretary Arnett returned to testify at that hearing that the present MOA "prevented adequate protection of the environment." [2] Two months later on July 15, 1985 in the third oversight hearing on Section 404, Acting Assistant Interior Secretary Craig Potter reported that on the key MOA issues they were still at "an impasse" with Mr. Dawson. [10]

Mr. Arnett and Mr. Potter are not alone in their belief that the MOA championed by Mr. Dawson must be revised. Former **Interior Secretary William Clark** wrote Mr. J. Ron Brinson, President of the American Association of Port Authorities that "the 1982 MOA has resulted in a thirteenfold increase in elevations of permit decisions. Under the 1980 MOA, only 1.3 cases per year required resolution at the Washington Office level, while in the first year of the 1982 agreement, 15 cases required action by both Assistant Secretaries...**My wish is that changes in the MOA will bring environmental protection into balance with regulatory relief**." (emphasis added) [21]

EPA Deputy Regional Administrator, Region I, wrote Assistant Administrator for External Affairs, Josephine Cooper, in December 1983 that "The Army interpretation of the MOA is unreasonable and counterproductive." [22] EPA's Region V Water Division Director, Charles Sutfin, wrote his Deputy Regional Administrator that same month that "It could be argued that the 404(q) MOA is designed in such a manner as to preclude the USEPA from having any meaningful involvement in the 404 permit program. Its restrictions on review times, extensions of comment periods, and the scope of the USEPA's review of proposed projects are unwarranted and detrimental to the goals and objectives of the Clean Water Act." [23] One year later EPA terminated its MOA with Army after unsuccessfully seeking revisions from Mr. Dawson.

At the May 21, 1985 hearing before the Senate Environment Committee, Ms. Cooper testified for EPA that "We have been negotiating with the Army since the memorandum lapsed on December 1, 1984 but have not yet reached agreement." [2] Two months later at the July 15 hearing Mr. Richard Sanderson, Acting Assistant Administrator for External Affairs, like Mr. Potter, testified that EPA also had "not been able to find an area of agreement" with Mr. Dawson on the two key MOA issues. [10]

Through all of the lengthy dispute over the MOA, Mr. Dawson has maintained that Interior Secretary Clark, Assistant Interior Secretaries Arnett and Potter, EPA Administrators Ruckelshaus and Thomas, and Senators Chafee, Stafford, and Mitchell are wrong in their assessment that the present MOA must be revised to provide adequate environmental protection. The controversy surrounding the MOA is their fault, not his. They have prevented a resolution of the conflict, not him.

We find that contention absurd and revealing about Mr. Dawson's ability to work with other Administration officials in a multi-agency environmental program like Section 404.

In contrast to the Clean Water Act's express prohibition of unpermitted discharges of all fill material in waters of the United States, Mr. Dawson refuses to revise Army's definition of fill material which exempts discharges of fill that are accidental or that are "primarily to dispose of waste." Mr. Dawson contends that such fills should be regulated under Section 402 of the Clean Water Act and the NPDES program for effluent limitations. Nothing in the Clean Water Act indicates a congressional intent to exclude such discharges from Section 404 regulation and, in fact, the Army definition is in violation of the plain language of Section 404(a) and as such is invalid. Yet the only reason Mr. Dawson offered at the June 10 oversight hearing before the Senate Environment Committee for refusing to modify Army's limited definition of fill material was "we feel we have the expertise to deal with the fill question when that is the primary purpose." However, Mr. Dawson did concede that "it is not always easy to say what that primary purpose is and what may be an initial primary purpose may evolve into some other purpose later on." [3]

Mr. Dawson's contention that solid waste fills are regulated under Section 402 is belied by Assistant Administrator Cooper's insistence that EPA's "position has been consistently that fill should be regulated under Section 404, whatever the purpose of that fill." [3] EPA maintains that Mr. Dawson's "primary purpose" test is unworkable administratively because the "primary purpose" in any given situation may be unidentifiable. In addition, the test makes no sense because adverse environmental impacts from a fill are unrelated to the discharger's intent and therefore the line drawn by Mr. Dawson is arbitrary.

Mr. Dawson inherited this dispute over solid waste disposals in wetlands and other waters, but he has presided over Army's continued refusal to regulate these discharges for the past four and a half years and they remain largely unregulated to this day. Moreover, in a sworn statement in U.S. District Court dated June 1984, Mr. Dawson stated that Army and EPA would publish a joint definition of fill material in May 1985. No such definition has appeared and on July 15, 1985 Mr. Dawson told Senators Chafee and Mitchell that a proposed definition would not be available until January 1986. In the meantime, Army, under Mr. Dawson's direction, steadfastly refuses to regulate discharges of fill material where the primary purpose is to dispose of waste.

Mr. Dawson's Jurisdictional Deregulation of Isolated Wetlands

Thirteen years after passage of Section 404, ten years after the landmark court decision in NRDC v. Callaway, and eight years after Congress expressly stated that Section 404 applies to wetlands without limitation, Mr. Dawson, as noted at the beginning of this statement, maintains that the limit of Army's jurisdiction over wetlands is unclear. Mr. Dawson invokes this supposed jurisdictional uncertainty as a means of avoiding regulation of wetlands filling. On June 10, 1985, Senator George Mitchell told Mr. Dawson, "the Corps has taken what can only be described as an increasingly narrow view of its jurisdiction in this area and has adopted what I think are policies that are clearly inconsistent with the law. ...failure to assert jurisdiction in repeated instances in which it may exist, in which I believe and others believe it does exist, is certainly narrowing of jurisdiction." [3]

One area which Mr. Dawson apparently has found particularly fertile for this type of jurisdictional deregulation is the protection of isolated wetlands. Under Section 404, the jurisdiction over such waters extends to the furthest extent of the Commerce Clause in the Constitution (the basis for virtually all federal regulatory statutes). The Supreme Court has reviewed scores of federal statutes to determine if they exceed Congress' power under the Commerce Clause and has **never** invalidated a statute in the last 50 years on such a ground. Moreover, **every** court but one has concluded that Congress intended in the Clean Water Act to assert federal jurisdiction over the nation's waters to the full extent of its constitutional power. The one exception is now before the Supreme Court, where the Justice Department of this Administration, as noted earlier, argues that any contention that "it is 'not clear' that Congress wanted the Corps to exercise the broadest possible jurisdiction over the Nation's wetlands is simply untenable..." [4]

Yet, Mr. Dawson told Senator Mitchell and other members of the Senate Environment Committee on June 10, 1985 that "[t]he problem, Senator, of what constitutes interstate commerce...is a very difficult legal definition." [3] An April 8, 1985 letter from Mr. Dawson to Senator Chafee maintains that "judicial rulings vary widely" on what constitutes interstate commerce. [24] This completely unsupported statement by Mr. Dawson generated this response by Senator Chafee on June 10, 1985, "I don't know at all that judicial rulings vary widely. I think they are consistent...

You show me a case that has ever been won on the other side." [3] Mr. Dawson could not provide any.

At the third oversight hearing on July 15, 1985, Mr. Dawson was as uncertain as ever about whether Army's jurisdiction extended to isolated wetlands. His continuing doubts brought this strong rebuke from Senator Mitchell,

> "I just want to make this point, Mr. Dawson, which I made at the previous hearing. **You are required by law to administrate and enforce the law.** The only thing you have now in this area is a clear expression of Congressional intent to exercise jurisdiction under the commerce clause to the fullest extent permitted by law. Any reading of the background of this must inevitably lead to the conclusion that you should ascertain and implement jurisdiction over isolated wetlands for the reasons that have emerged during this question and answer period and the previous one. I think you have to do that. That is incumbent on any public official who has to enforce the law. **You may disagree with it...but you can't leave it up to every individual person implementing the law to decide whether it makes sense or is practical; whether it can or can't be done. In our system, that is a legislative determination. The legislature in this area has spoken.**" [10]

Mr. Dawson remains unconvinced that he is required to implement the law and assert jurisdiction consistently over isolated wetlands. He has so far refused requests by the Senate Environment Committee to provide guidance to field personnel on how to determine interstate commerce jurisdiction over isolated wetlands, leaving 37 Corps districts to decide what the U.S. Constitution means.

Mr. Dawson's Refusal To Amend His Environmentally Harmful NEPA Regulatory Proposal

As Deputy Assistant Secretary, Mr. Dawson signed proposed regulations to abbreviate substantially the Corps' NEPA regulations. Far from reorganizing and simplifying existing regulations, Mr. Dawson's proposal cuts back on the substantive law contained in the current regulations in such a way that will lead to more controversy, confusion, and litigation in the long run. Moreover, Mr. Dawson failed to demonstrate and document any need for a revision in the first place. EPA went so far as to request the Council on Environmental Quality (CEQ) to review the proposed regulations. On February 25, 1985, EPA Administrator Lee Thomas wrote the CEQ that "EPA's efforts to resolve our concerns with the Department of the Army have not proven successful...that major problems remain, and that the regulation would have unsatisfactory impacts on the quality of the environment." Administrator Thomas added that "these revisions would have an adverse effect on EPA's program to review significant environmental impacts of proposed Federal actions under Section 309 CAA [Clean Air Act], and to prevent unacceptable adverse effects of dredge and fill discharges under Section 404 of the Clean Water Act (CWA). We believe these changes would increase the likelihood of coordination problems between EPA and the Corps." [25]

Mr. Dawson's response to this review by CEQ, like his response to the regulation of solid waste and problems with the MOA, has been to stall. He has requested four extensions of time to date to respond to EPA's crticisms of his regulatory proposal. The latest extension gives Mr. Dawson until September 30, 1985. Is Mr. Dawson waiting to be confirmed before he responds?

Conclusion

The Assistant Secretary of the Army (Civil Works) is a key figure in this nation's efforts to conserve our valuable wetland resources. Mr. Dawson has shown himself unwilling to administer and enforce the laws governing his agency.

The record of his performance over the past four and a half years demonstrates fundamental opposition to the goals of the Clean Water Act. His positions on wetland protection under Section 404 have been at odds with the other key officials in this Administration charged with similar responsibilities. He has succeeded only in producing unprecedented levels of confrontation with the state and federal agencies which share a role in the Section 404 program.

Consequently, the Bass Anglers Sportsman Society, Environmental Defense Fund, National Audubon Society and National Wildlife Federation urge this Committee to vote in opposition to the confirmation of Mr. Robert K. Dawson as Assistant Secretary of the Army (Civil Works).

List of Exhibits

1. Testimony of Robert K. Dawson, Acting Assistant Secretary of the Army (Civil Works), before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, May 20, 1985.

2. Hearings before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, May 21, 1985.

3. Hearings before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, June 10, 1985.

4. U.S. Brief before the Supreme Court in *U.S. v. Riverside Bayview Homes, Inc.* at 27.

5. Letter, Wilmington District Engineer to Hobart Truesdale, President, First Colony Farms, February 26, 1982.

6. Letter, Robert K. Dawson to Eric Eidsness, November 17, 1982.

7. Letter, Major General John F. Wall to Commander, New England Division, May 31, 1985.

8. U.S. EPA Region I Press Release, August 13, 1985.

9. Letter, Senator Gordon J. Humphrey to Michael R. Deland, Administrator, EPA Region I, August 27, 1985.

10. Hearings before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, July 15, 1985.

11. Letter, Senator John Heinz to Vice President George Bush, September 9, 1983.

12. Hearings before the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works, July 16, 1982.

13. Letter, G. Ray Arnett to Robert K. Dawson, May 9, 1984.

14. Letter, Robert K. Dawson to G. Ray Arnett, June 1, 1984.

15. Letter, G. Ray Arnett to Robert K. Dawson, August 10, 1984

16. Letter, Robert K. Dawson to G. Ray Arnett, August 30, 1984.

17. Letter, J. Craig Potter to Robert K. Dawson, October 2, 1984.

18. Letter, Robert K. Dawson to G. Ray Arnett, October 18, 1984.

19. Letter, G. Ray Arnett to Robert K. Dawson, November 7, 1984.

20. Letter, G. Ray Arnett to Robert K. Dawson, December 17, 1984.

21. Letter, William Clark to J. Ron Brinson, September 12, 1984.

22. Memo, Paul S. Keough, Region I EPA, to Josephine Cooper, December 6, 1983.

23. Memo, EPA Region V, Charles H. Sutfin to Alan Levin, December 23, 1983.

24. Letter, Robert K. Dawson, to Senator John H. Chafee, April 8, 1985.

25. Letter, Lee Thomas, Administrator, EPA, to Alan Hill, Chairman, Council on Environmental Quality, February 25, 1985.

[The exhibits listed above have been retained in committee files.]

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